

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,	)	
W.A. DREW EDMONDSON, in his	)	
capacity as ATTORNEY GENERAL	)	
OF THE STATE OF OKLAHOMA,	)	
et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 05-CV-329-GKF-PJC
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

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TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS  
DECEMBER 9, 2009  
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY:                      BRIAN P. NEIL, CSR-RPR, RMR, CRR  
   United States Court Reporter

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*WITNESSES ON BEHALF OF THE PLAINTIFF*

**EUGENE WELCH, PH.D.**

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1 Wednesday, December 9, 2009

2 \* \* \* \* \*

3 THE COURT: Before we begin this  
4 morning, the attorneys may have noticed that I'm  
5 trying to deal with whatever motions have arisen  
6 during the course of the trial. There's one left.  
7 It's the state's motion for reconsideration of the  
8 court's September 4, 2009, minute order which deals  
9 with Section 427B, and you'll recall the long  
10 discussion we had with Mr. Baker and Mr. Bullock and  
11 Mr. Jorgensen.

12 And as I'm sure you've all experienced, it's  
13 an interesting profession that we're in, insofar as a  
14 new day may dawn and you may see things in a different  
15 light. It seems to me that it may have been error for  
16 the court to preclude the plaintiff from attempting to  
17 put on any evidence with regard to that particular  
18 theory. It does not mean that the court may not  
19 ultimately interpret 427B in the fashion that it did,  
20 but I am concerned because we don't want to try this  
21 over again, if we don't have to.

22 It seems to me that I need to give the  
23 plaintiff the opportunity to present whatever evidence  
24 it wishes to present -- I think Mr. Baker was the  
25 point man here -- with regard to this foreseeability

1 argument.

2 The plaintiff has shifted ground a bit in the  
3 motion to reconsider from the previous motion, insofar  
4 as I think at least one time the plaintiff in the  
5 motion to reconsider reads this phrase: "One who  
6 employs an independent contractor to do work which the  
7 employer knows, or has reason to know, to be likely to  
8 involve a trespass."

9 I think at the time of the hearing we talked  
10 about employment of these independent contractor  
11 growers to do the work of growing chickens. And  
12 unless I'm mistaken, I think at least one point the  
13 reference to "do work" was to do work of disposing of  
14 poultry waste. I'm not sure that's the case here.

15 But even if we don't go that far, Mr. Baker's  
16 foreseeability argument potentially allows the  
17 application of 427B, even when an independent  
18 contractor, for instance, hires another independent  
19 contractor to dispose of the waste. And it should not  
20 be a safe harbor under 427B for the independent  
21 contractor then in turn to do that which was  
22 foreseeable from the integrator's standpoint.

23 So I'm going to grant the state's motion for  
24 reconsideration, which is No. 2623, to allow whatever  
25 evidence the state wishes to present to the court with

1 regard to its theory under 427.

2 And I know it comes late, but as you point  
3 out, Mr. Baker -- and Ms. Moll, I think, may have  
4 written this brief. I don't know. Mr. Baker. As you  
5 point out, Mr. Baker, these motions in limine may be  
6 reconsidered at any time, and I think it's important  
7 to do this now before the close of plaintiff's case to  
8 allow you to present whatever additional evidence you  
9 wish. You may not wish to present any additional  
10 evidence with regard to that because you may be  
11 satisfied with that which has already been presented.  
12 In any event, No. 2623 is granted.

13 All right. Let's proceed.

14 MR. ELROD: May I approach the witness,  
15 Your Honor?

16 THE COURT: You may.

17 MR. ELROD: Your Honor, I move for  
18 introduction by stipulation Defendants' Joint Exhibit  
19 98, which is the 2009 Lake Tenkiller Visitor's Guide.

20 THE COURT: There is no objection?

21 MR. PAGE: It's the Christmas season,  
22 Your Honor. No objection.

23 THE COURT: May the spirit spread.  
24 Joint Exhibit No. 98 is admitted.

25 MR. ELROD: Thank you, Counsel.



**CROSS-EXAMINATION****BY MR. ELROD:**

Q. Dr. Welch, my name's John Elrod. I'm not sure whether we've met or not, but I don't think I was --

A. I'm sure I heard your name.

Q. It's nice to -- I've heard your name too. It's nice to meet you, sir.

I've handed you a document entitled: "2009 Visitor's Guide for Lake Tenkiller." I'd like to ask you some questions to see whether you disagree or agree with some of the statements in here regarding fish.

A. Okay.

Q. If you'll look at the inside front cover -- actually it's page 4 in the lower left-hand corner -- you'll see, sir, that this publication was put together by an entity called the "Greater Tenkiller Area Association," something like that -- I butchered it -- but the Greater Tenkiller Area Association. They have board members, including Ed Brocksmith and a number of other people, and that it's produced in cooperation with the Oklahoma Tourism and Recreation Department, 75,000 copies printed.

Do you see where I'm reading that, sir?

1 A. Yes.

2 Q. Okay. Now, understanding, of course, that  
3 this is not a scientific journal, I'd like to ask you  
4 some questions about statements made on page 51, 5-1,  
5 which you'll find in the lower right-hand corner.

6 Before we get into the reading of this,  
7 Dr. Welch, are you aware that the state record  
8 smallmouth bass was caught within the last couple of  
9 years in the Horseshoe Bend area of Lake Tenkiller?

10 A. I've heard that.

11 Q. And do you suppose he grew up there or she  
12 grew up there or do you think somebody put it there?

13 A. I think it probably grew there. But no, I  
14 don't think anybody put it there. When they stock  
15 smallmouth, they're small fish.

16 Q. Okay.

17 A. Nobody could afford to plant large fish.

18 Q. Thank you. Now, let's talk about crappie.  
19 It says here, "Crappie fishing is usually best in the  
20 spring as the fish prepare for spawning. Look for  
21 small pea-gravel-type banks and shallow Willow trees.  
22 During the hot summer months, crappie can be found in  
23 deep water about 25 to 40 feet deep. In the fall,  
24 crappie move back to the shallow waters and can be  
25 found around submerged brush. Crappie can be caught

1 from one of the heated fishing docks around the lake  
2 in the wintertime."

3 Do you agree that the statement regarding  
4 crappie behavior in this visitor's guide is possible  
5 in Lake Tenkiller?

6 A. Yes. In certain parts.

7 Q. Okay. Now, moving on to white and striped  
8 bass, white bass --

9 A. Just a minute. What were the depth ranges?

10 Q. Twenty-five to forty feet in the hot summer  
11 months.

12 A. All over the reservoir or --

13 Q. All I know is what I'm reading in this  
14 document, sir.

15 A. I'm trying to think what the -- in some parts  
16 of the reservoir, I think that's possible.

17 Q. Moving on to white and striped bass, "White  
18 bass, or sand bass, (sandies), provide excellent  
19 fishing opportunities in the spring as they head for  
20 the upper Illinois River to spawn. From Carter's  
21 Landing to Horseshoe Bend is an excellent area to  
22 catch the spring run. During the summer months, the  
23 sandies begin to school. Areas near Cookson, Chicken  
24 Creek, and Snake Creek are good choices."

25 Now, do you agree that that kind of behavior

1 by sand bass, sandies, as described in this visitor's  
2 guide is possible in Lake Tenkiller?

3 A. Is -- there's no scientific names in here so  
4 I don't know what -- there's a picture that could  
5 be --

6 Q. I think that's a picture of a striper but I  
7 could be wrong.

8 A. Yeah, it's a striped bass. Well, they stock  
9 striped bass in --

10 Q. Okay.

11 A. Well, can I comment or --

12 Q. Sure. Go ahead.

13 A. They stock striped bass but they haven't  
14 taken. So I've seen -- I've seen this advertisement  
15 about striped bass, if it's the marine species that  
16 they've stocked in a number of reservoirs around the  
17 country. It's not a good fishery in Tenkiller, to my  
18 knowledge.

19 Q. Are you aware that the state-record striped  
20 bass was caught in Lake Tenkiller?

21 A. No, I'm not.

22 Q. Forty-eight pounds, something like that?

23 A. I can say the water quality that exists in  
24 Lake Tenkiller is not good for striped bass. There  
25 are several reservoirs in the country that show that

1 if striped bass have to live in water that's more than  
2 24 degrees centigrade, or even more than 20 degrees  
3 centigrade, and the oxygen content --

4 Q. Can you give that us to in Fahrenheit?

5 A. Twenty degrees centigrade is 68.

6 Q. Okay. So you're saying that the water has to  
7 be above 68 degrees for striped bass to live?

8 A. Yeah. Below, below. Because what's been  
9 shown is if they grow in this stressed -- if you have  
10 them in a stressed environment and they reproduce, the  
11 young are abnormal.

12 Q. Okay.

13 A. There's a high survival. It's amazing. But  
14 this study has been done in Tennessee where the  
15 striped bass existing in stressed, squeezed conditions  
16 have produced damaged young; that is, they're abnormal  
17 and have low survival rates.

18 Q. Now, I'm about to correct something I just  
19 told you, and I'm sorry if I misled you.

20 How cold is the water that comes out from the  
21 penstock?

22 A. It's probably 15 degrees.

23 Q. Celsius?

24 A. Celsius.

25 Q. Less than 20? So it's colder?

1 A. So 10 is 50, so you add -- so it's about  
2 60.

3 Q. Now, here's where I made a mistake. The next  
4 paragraph, sir, says, "Striped bass are caught below  
5 Tenkiller dam in the Lower Illinois River and Arkansas  
6 River near Gore and Marvel Resort. Striper fishing is  
7 tremendous year-round with the lower Illinois  
8 River" -- that would be the area below the dam --  
9 "producing the state-record 47-pound 8-ounce striper."

10 A. That's cool.

11 Q. Your testimony is that's not possible?

12 A. No.

13 Q. That water's 15 degrees Celsius, you just  
14 said.

15 A. Yeah. That's fine.

16 Q. I thought it had to be warmer than 20 for  
17 stripers?

18 THE COURT: Below.

19 A. No. It can't be warmer; it has to be  
20 colder.

21 Q. (BY MR. ELROD) Okay. I'm sorry. My  
22 mistake.

23 A. They can't take the warm temperature.

24 THE COURT: The striper fishing is above  
25 Arkansas River up to the dam.

1 MR. ELROD: Yes. Right. Sounds like a  
2 man of experience, Your Honor.

3 THE COURT: Yes, sir.

4 Q. (BY MR. ELROD) Talk about large and  
5 smallmouth bass for a second.

6 "During the summer months, largemouth bass  
7 move to deeper water. Night fishing to popular due to  
8 the heavy day use on the lake. Smallmouth bass  
9 provide some scrappy fighting in the summer. Most  
10 successful areas to catch smallmouth bass are in the  
11 Upper Illinois River and Baron Fork Creek. Largemouth  
12 bass return to the shallows as water temperatures  
13 start to cool down in the fall. In the wintertime,  
14 largemouth bass seek deep water."

15 Now, do you agree, sir, that the behavior  
16 described here for largemouth bass and smallmouth bass  
17 is possible in Lake Tenkiller?

18 A. Well, I'd have to know what the temperatures  
19 are. But the fact that -- let's see. Yeah, they're  
20 in the river. That's fine. It's cool, cool enough  
21 for them.

22 Q. Now, if you'll turn the page, sir, there's a  
23 blurb in here that was mentioned very briefly  
24 yesterday; that is, the Field & Stream ranks Tenkiller  
25 and the Illinois as the 16th best fishing in the

1 United States. Do you see that?

2 A. Uh-huh. Well --

3 Q. What are your thoughts about that given your  
4 testimony?

5 A. -- I showed yesterday -- or I talked about  
6 the quality fishing of largemouth and it's  
7 double -- it's 88 per hour, the catch rate in  
8 Tenkiller, and the quality fishery level is 40 so it  
9 is a good fishery. And I used that as an example of  
10 largemouth liking eutrophic conditions. So more food  
11 so -- right. I mean, I'm not denying that largemouth  
12 fishing is good in Tenkiller. This doesn't specify  
13 smallmouth as being in the 16th best fishing.

14 Q. Well, it does. It says -- if you look on the  
15 left-hand column about halfway up, the written part --

16 A. Let me -- I got to get the hard copy. I  
17 can't read that. Oh, okay. Fine.

18 Q. It says, "Tenkiller to the south and Gibson  
19 to the north" -- "as well as some pleasant surprises,  
20 like trout fishing and exceptional smallmouth bass  
21 fishing in the Illinois River. At least it talks  
22 about smallmouth bass in the Illinois."

23 A. Yeah. You know, eastern Oklahoma is the  
24 farthest original range of smallmouth bass. There  
25 were no lakes here originally before you built



1 reservoirs and so they were stream fish.

2 Q. Right.

3 A. So they existed from the Great Lakes to  
4 Connecticut -- I mean, to Quebec and a little bit east  
5 and then down in the Tennessee and into eastern  
6 Oklahoma. Largemouth have a much wider distribution.  
7 But, you know, that's written -- it was written in  
8 1949.

9 Q. Right.

10 A. Smallmouth bass like clear, cool water with  
11 rocky substrates, whether it's in streams or lakes.

12 Q. They like streams?

13 A. They're very picky.

14 Q. They're naturally a stream fish, aren't  
15 they?

16 A. In the ichthyology texts, it says streams as  
17 lakes. In Michigan, which I'm very familiar with,  
18 northern Michigan, it's smallmouth. Northern Michigan  
19 has oligotrophic lakes. Southern Michigan has mostly  
20 eutrophic lakes; it's largemouth. Smallmouth do not  
21 like eutrophic conditions.

22 Studies in reservoirs in Kentucky show that  
23 smallmouth distribute in the lower part of the  
24 reservoir where it's more oligotrophic conditions.  
25 They don't like the upper part; they're not found

1 there.

2 Q. But the largemouth bass, per your testimony,  
3 thrive in Lake Tenkiller?

4 A. Yes.

5 Q. And that's where the -- those are the fish  
6 that these Wal-Mart fishing tournaments gives hundreds  
7 of thousands of dollars of prizes to winners. That's  
8 what those fishing tournaments are all about,  
9 largemouth bass?

10 A. Yeah. If they could catch smallmouth, they'd  
11 be smallmouth because they're better, they're  
12 scrappier.

13 Q. You're just not going to give up, are you?

14 A. That's my opinion. Well, I fish-farm and I  
15 know what they do. I caught both largemouth and  
16 smallmouth, and smallmouth, they pack it.

17 Q. I coined the term yesterday during your  
18 testimony called species envy. I mean, if you're a  
19 carp, you're happy to be a carp, are you not? I mean,  
20 if you're a catfish, you're happy to be a catfish. I  
21 mean, what's the deal? What gives us the right to  
22 judge whether a smallmouth bass is better than a  
23 carp?

24 A. Humans have too much power, absolutely, over  
25 nature.

1 Q. You're right. I think I'll sit down. Thank  
2 you.

3 THE COURT: Do we have any catfish  
4 fishermen here?

5 Any further cross-examination?

6 MR. JORGENSEN: Not from us.

7 THE COURT: Mr. Tucker, saw you in the  
8 paper today.

9 MR. TUCKER: Sorry, Your Honor. I want  
10 to keep you looking forward to the next thing to come.  
11 We always have to have something to look forward to;  
12 right?

13 THE COURT: I don't have any work to do  
14 here.

15 MR. TUCKER: I know. I've been feeling  
16 pretty sorry for you at your caseload; you've just had  
17 one case all fall. I can't imagine what the other  
18 judges must think.

19 May it please the court.

20 **CROSS-EXAMINATION**

21 **BY MR. TUCKER:**

22 Q. Sir, my name is John Tucker. I think you and  
23 I said "hello" in the hallway the other day, but my  
24 partner, Ms. Hill, who you do know.

25 A. Hi, Mr. Tucker.

1 Q. Nice to see you, sir. There's no way I can  
2 follow the act that you just were entertained by, but  
3 I did want to ask you a couple of follow-up questions  
4 sort of on the same line.

5 And for purposes of just letting the record  
6 be more fulsome, I'll hand you over what I've marked  
7 for identification as demonstrative -- or Defendants'  
8 Demonstrative 276.

9 A. This looks like that, about a six- or  
10 seven-pound smallmouth.

11 Q. I hope to put a little flesh on --

12 A. Well, you never can tell how far they're  
13 holding it out in front of them.

14 Q. I hope to put a little flesh on Mr. Elrod's  
15 story there, if I might, and represent to you that if  
16 you look at that, that's the lake record for the  
17 smallmouth bass. Do you see that, sir?

18 A. I do.

19 Q. And can you determine what lake that was  
20 caught in from the Department of Wildlife  
21 Conservation's printout there?

22 A. No, I can't. But I guess it's Tenkiller.

23 Q. Look right below the picture, the second line  
24 below the photograph of --

25 A. Tenkiller, right. Okay.

1 Q. You'd think that man would have a bigger  
2 smile on his face, wouldn't you, for catching that  
3 fish.

4 Do you know --

5 A. Oh, he's smiling internally, I'm sure.

6 Q. There you have it. And do you notice that  
7 fish was also released and returned to the lake?

8 A. That's the right thing to do.

9 Q. And it was caught during a tournament. If  
10 you'll turn the next page, it shows you where and when  
11 it was caught. Can you look at that for me, please?

12 A. Date caught, area caught, Snake Creek.

13 Q. All right. Now, are you familiar where Snake  
14 Creek is?

15 A. No.

16 Q. And when was it caught, sir?

17 A. April 25th.

18 Q. Of this year?

19 A. 2009, yeah.

20 Q. All right. Now, yesterday you'll recall the  
21 judge asked you some questions about the dendritic  
22 nature of this lake and other lakes in Oklahoma?

23 A. Right.

24 Q. And you said that probably those coves  
25 provide good fishing habitat?

1 A. Right.

2 Q. And Snake Creek, I'll represent to you, is  
3 one of the coves on Lake Tenkiller, so this is might  
4 be a demonstrative of that kind of good fishing  
5 habitat you were talking about --

6 A. That's right. Especially in April when the  
7 temperatures are low.

8 Q. Now, you didn't do any -- but that fish has  
9 to live in the lake year-round, he doesn't get to  
10 holiday someplace else in the middle of summer, does  
11 he?

12 A. Well, he may decide that there's not much  
13 habitat here with this cool water and slip up into the  
14 rivers where there is cool water.

15 Q. I mean, he doesn't take a strip to Colorado  
16 to cool off? I mean, that sounds facetious, but that  
17 is his habitat --

18 A. They can do that. They can migrate into the  
19 rivers if the conditions are bad in the lake.

20 Q. The lake and the river is his habitat; is  
21 that right?

22 A. What?

23 Q. The lake and the river would be his habitat?

24 A. Yes.

25 Q. All right. And in that habitat, this fish

1 obviously has flourished for quite some time?

2 A. That's true.

3 Q. And when you took tests -- or the tests that  
4 you used for the opinions that you gave, those results  
5 came from the channel of the lake, didn't they?

6 A. Yes.

7 Q. Now, you didn't have matching tests from the  
8 various coves such as Snake Creek; is that right?

9 A. No, we didn't go into Snake Creek. But we  
10 did do cross-sectional measurements of profiles of  
11 dissolved oxygen and temperature, and these profiles  
12 lay right on top of each other. So I'm confident that  
13 the thermocline is stable horizontally in lakes and  
14 reservoirs and that that thermocline extends to the  
15 shore, wherever that hits, and that eight to ten  
16 meters below that in July and August and September,  
17 there's not going to be any oxygen.

18 Q. But can't we agree that for whatever reason  
19 this habitat has proved pretty favorable to that  
20 particular fish?

21 A. Well, you know, he caught it in -- he caught  
22 it in April, the temperatures are lower, smallmouth  
23 grow in the spring, and it's the summertime when  
24 they -- when they go into deep water. Whether the  
25 temperature is limiting or not, they like to go to

1 deep water.

2 Q. Sir, is that a young fish?

3 A. What?

4 Q. Would that be a young smallmouth bass?

5 A. No. I --

6 Q. How old would a fish that size be, a  
7 smallmouth bass, based upon your ichthyology  
8 expertise?

9 A. Well, it could be six, seven years, I'd  
10 say.

11 Q. And just -- I don't mean to speak the  
12 obvious, but that means that fish has been around for  
13 six or seven summers; right?

14 A. Yeah.

15 Q. So that fish found some way to apparently  
16 thrive for six or seven summers?

17 A. That's right.

18 Q. All right. Now, when you did your study,  
19 sir, the pike and the striper that you talked about,  
20 neither of those are native fish, are they, native to  
21 Oklahoma?

22 A. True.

23 Q. And Oklahoma and other states have over the  
24 years experimented with stocking fish from other  
25 regions to see if they would do well; is that right?



1 A. True.

2 Q. And as you pointed out, up until the middle  
3 of last century, or perhaps maybe the '20s or '30s,  
4 Oklahoma didn't have any lakes at all, did they?

5 A. True.

6 Q. This was a stream and river state, then the  
7 government came along and dammed everything up and now  
8 we have reservoirs?

9 A. Yeah, that's true.

10 Q. And so the Department of Wildlife decided,  
11 well, let's see what else we can try stocking that  
12 didn't live in our streams that people might enjoy  
13 fishing that increase recreation; is that right?

14 A. It appears that that's what went through  
15 their heads, yes.

16 Q. And are pike and stripers the only fish that  
17 the Department of Wildlife has attempted to stock  
18 since the '30s, 1930s?

19 A. No. They stocked smallmouth bass and the  
20 stocked largemouth bass.

21 Q. Let me rephrase that. Only species they've  
22 attempted to introduce?

23 A. There's trout in -- in the tailrace area, I  
24 understand, and I do not think trout were native here  
25 to begin with, but, you know, it's possible but I

1 don't think so.

2 Q. And sometimes when you stock non-native fish,  
3 it works and sometimes it doesn't; is that right?

4 A. That's true.

5 Q. Like the spotted bass, is that a native fish?

6 A. I think spotted bass were in the river before  
7 the dams were built.

8 Q. The Florida --

9 A. But I'd have to go back and check that  
10 publication, but I'm -- I'm -- if I had to say yes or  
11 no, I think they were.

12 Q. And when you stock fish that aren't native to  
13 a region, when you bring them into a place they've  
14 never been, in some reservoirs they do great and some  
15 reservoirs they survive and in some reservoirs they  
16 just aren't thrifty at all; isn't that right?

17 A. Yes.

18 Q. And to go back to the old commercial, that's  
19 kind of what happens when you tamper with Mother  
20 Nature, sometimes it works and sometimes it doesn't;  
21 right?

22 A. It isn't chance necessarily, just chance.  
23 The habitat makes a huge difference in who survives  
24 and who doesn't survive.

25 Q. And you've talked a lot about survival and

1 about the bountiful largemouth fishery at Lake  
2 Tenkiller.

3 As a part of your analysis, did you meet with  
4 the stakeholders who are most interested in your topic  
5 of adverse impact on the Tenkiller fishery to confirm  
6 your opinions?

7 By "stakeholders," let me tell you who I mean  
8 before you answer the question. Did you meet with any  
9 fishermen?

10 A. No.

11 Q. Did you meet with any of the fishing guides  
12 that operate at Lake Tenkiller or on the Illinois  
13 River?

14 A. No.

15 Q. Did you meet with any of the Department of  
16 Wildlife Conservation game rangers?

17 A. Game rangers, no. Through Dr. Gendusa, we  
18 contacted the fisheries biologists in the Department  
19 of Wildlife Conservation.

20 Q. As to the people that are actually using the  
21 lake, though, you didn't talk to any of them?

22 A. No.

23 Q. Would their opinions of how fishing is be  
24 available to confirm or invalidate your opinion?

25 A. Well, in my experience dealing with fisheries

1 in reservoirs, I never got very good information from  
2 the public. They always wanted information from me  
3 and I -- I'm not saying it's not possible, but I'm a  
4 fisherman and fishermen tell lots of lies.

5 Q. There is a certain level of exaggeration,  
6 I'll admit. Fish do seem to grow quite a bit once  
7 they got into your memory and out of your sight.

8 But in any event, you made no effort to  
9 contact any of the actual stakeholders who use that  
10 lake to determine whether their belief is that fishing  
11 is getting better or getting worse?

12 A. I did not.

13 Q. All right. Now, again, you have made an  
14 analysis, a scientific analysis, and you've talked to  
15 us about temperature, you've talked to us about the  
16 plunging river, and I'm assuming the river plunges all  
17 over the lake, including in Snake Creek, this river  
18 diving down and --

19 A. Well, I don't know how deep Snake Creek is in  
20 that inlet. So if -- you know, if it's in the  
21 metalimnion area, yeah, it could be move out into  
22 the -- into the cold --

23 Q. You told us all about that. As a matter of  
24 theory, it's obvious that this is -- you tell us that  
25 that is a challenged fishery; is that correct?

1           A.    I'm telling you that the growth of cool water  
2 species is inhibited --

3           Q.    All right.

4           A.    -- from the standpoint of oxygen and  
5 temperature.

6           Q.    Okay. Do you know whether the people that  
7 use the lake are pleased with the fishing there?

8           A.    I would guess they probably are judging from  
9 the derbies with the largemouth and all that.

10                   MR. TUCKER: I think that's all I have.  
11 Thank you.

12                   THE WITNESS: Thank you.

13                   THE COURT: Thank you. Any further  
14 cross-examination?

15                   MR. TUCKER: I'm sorry. I have one  
16 more, Your Honor.

17           A.    Do you know what the age of that smallmouth  
18 is?

19           Q.    (BY MR. TUCKER) No, sir. They returned him  
20 to the water so we can't really tell.

21                   I want to further validate Mr. Elrod's  
22 tourist publication with Demonstrative Exhibit 277, if  
23 I may. Looking at Demonstrative 277, can you identify  
24 what kind of fish that is?

25           A.    Well, it says it's a striped bass.

1 Q. Okay.

2 A. It looks like a striped bass.

3 Q. As we talked yesterday, we call those -- so  
4 we just don't get confused, we call those stripers.

5 A. Okay.

6 Q. Striped bass, you go to the restaurant and  
7 you get it and it comes from the East Coast someplace.

8 A. Okay.

9 Q. A striper we catch here.

10 Does that appear to be the record fish that  
11 Mr. Elrod was talking about?

12 A. Sure could be.

13 Q. It's the right weight, isn't it, 47 pounds, 8  
14 ounces?

15 A. Yeah. It looks like it would be that much.

16 Q. And that's a happy fisherman on the outside  
17 too; correct?

18 A. Yes.

19 Q. And that fish shows it was caught on the  
20 lower Illinois in 1996; is that right?

21 A. In June 1996.

22 Q. So in June of '96, we have a record striper,  
23 and then in April of 2009, we have a record  
24 smallmouth, all in connection with this fishery; is  
25 that correct?

1 A. Yes.

2 MR. TUCKER: Thank you.

3 THE COURT: Any further cross?

4 Mr. Page.

5 MR. PAGE: Thank you, Your Honor.

6 **REDIRECT EXAMINATION**

7 **BY MR. PAGE:**

8 Q. Dr. Welch, I want to ask you some questions  
9 concerning your testimony yesterday on  
10 cross-examination.

11 A. Okay.

12 Q. Do you recall some questions about the lack  
13 of -- or at least the fewer data that you had in  
14 Broken Bow concerning DO, do you believe, sir, that  
15 you had enough data to assess Broken Bow Lake's DO  
16 level and compare it with Lake Tenkiller?

17 A. I do.

18 Q. Would you please explain to the court why you  
19 believe that is the case? And if you want to look at  
20 some of those DO profiles --

21 A. Well, I can first say that the progression of  
22 dissolved oxygen in a reservoir or a lake each year is  
23 pretty similar, especially in the hypolimnion. One  
24 could confidently look at a couple of profiles during  
25 the same time in one reservoir and the same time in

1 another reservoir, and if there's enough difference in  
2 those you can be -- you can feel fairly certain that  
3 that difference is real. I think that's the case  
4 between Broken Bow and Tenkiller, even though there's  
5 fewer data -- data points.

6 Q. Okay. Could you use the data that we have  
7 here before the court and explain that or --

8 A. I can.

9 Q. Can you demonstrate that from the data that's  
10 on the Oklahoma exhibits that you've looked at?

11 A. I can.

12 Q. Okay. Which exhibits do you want to look at?

13 A. Whatever one they're -- I don't know what the  
14 numbers are.

15 MR. PAGE: May I approach, Your Honor?

16 THE COURT: You may, sir.

17 A. Can you hand them to me?

18 *(Discussion held off the record)*

19 A. Okay. 728 and the last one, 721.

20 Q. (BY MR. PAGE) Okay. Dr. Welch, looking  
21 at -- those are -- just to make the record clear,  
22 those are the DO profiles for Lake Tenkiller, that's  
23 721, and 728 is the profile for Broken Bow; correct?

24 A. Yes.

25 Q. Okay. Could you explain to us, sir, how this



1 data would show you had sufficient information to be  
2 able to compare these lakes?

3 A. Well, if I picked a similar time in July and  
4 August, I think they'd be comparable. So if we look,  
5 say, at the end of July, July 26th, and August 9th,  
6 those two profiles in Tenkiller, you'll see that  
7 there's a small part of the hypolimnion that has DO  
8 concentrations of one or less; the rest of it, they're  
9 less than a half in those months.

10 If you look at Broken Bow, say, during August  
11 13th and July 18th, even though they're in different  
12 years, these are similar profiles, and you'll notice  
13 in the whole hypolimnion those concentrations are  
14 above 4 milligrams per liter.

15 So that's why I say that you can compare  
16 these two bodies of water.

17 Q. Okay. Now, Dr. Welch, do you recall -- and  
18 we've touched on this a little bit this morning also,  
19 I think -- but do you recall questions yesterday  
20 concerning habitat -- available habitat for game fish  
21 and where you were asked about whether you evaluated  
22 prey and predator circumstances?

23 A. Right. I was.

24 Q. Can you explain the prey and predator  
25 differences between Broken Bow and Tenkiller?

1           A. Well, here's my thinking on that. We just  
2 heard how successful the largemouth fishery is in  
3 Broken Bow. They're both predators, they eat foraged  
4 fish, both smallmouth and largemouth. And my thinking  
5 is, if the largemouth can grow fat and sassy in  
6 Tenkiller eating prey -- and they prefer minnows, they  
7 will eat sunfish -- then smallmouth can eat the same  
8 thing. Smallmouth also like crawfish and -- but a  
9 largemouth will eat crawfish too.

10           So if the largemouth are doing well, I see  
11 there's no reason why there's not enough prey for  
12 smallmouth in Tenkiller. And if the -- if the  
13 survival of largemouth fry and juveniles is  
14 satisfactory in Tenkiller to, you know, build a  
15 population -- build a fishery, then the predation rate  
16 on smallmouth shouldn't be any greater than the  
17 predation rate on largemouth.

18           So that's how I would look at the comparison  
19 of predator/prey problems.

20           Q. And do you have an opinion as to whether or  
21 not there's a factor that's involved in Lake  
22 Tenkiller's water quality that affects smallmouth's  
23 ability to effectively consume food?

24           A. Well, I think if they -- yes. I mean,  
25 there's a -- here's the way you have to look at it.

1           You can have some survival of fish. As we  
2 just saw, probably these fish are using -- using the  
3 river during the cool times and the reservoir -- in  
4 the summertime when it's cooler and the reservoir when  
5 it's cooler in the spring, and most of the -- and a  
6 lot of the growth occurs in the spring. And if -- you  
7 could look at it this way.

8           If there were oxygen in the hypolimnion down,  
9 you know, below 8 to 10 meters, then you've got a lot  
10 more habitat for these fish to exist in rather than  
11 squeezing them into whatever possible nooks and  
12 crannies may exist or into the stream, and it's  
13 possible to grow a large fish.

14           But if you looked at the production per unit  
15 area of the reservoir, my estimate would be the  
16 production would be higher if you had that habitat  
17 available with oxygen in it so that there's more  
18 space. And, in fact, that is -- that is the basis for  
19 which -- from the standpoint of fisheries, aeration is  
20 applied in bodies of water that don't have enough  
21 oxygen. The justification is, you're increasing the  
22 habitat in which these fish can thrive.

23           Q. Okay, sir.

24           A. Not -- not restricting them to small -- small  
25 parts of the habitat.

1 Q. Dr. Welch, do you recall yesterday some  
2 questions addressed to you concerning the reliability  
3 of the CDM data that was collected for you for both DO  
4 and temperature?

5 A. Yes.

6 Q. Do you believe that the data that you  
7 obtained from CDM was reliable and valid to base your  
8 opinions in your report?

9 A. I believe it's valid. I would not have put  
10 it in my report if I did not think it was valid.

11 Now, when Cooke and I went out with  
12 these -- with Brian Bennett and Drew Santini, we  
13 gained a lot of respect for these fellas. We thought  
14 that they were hard-workers and careful. And  
15 subsequent experience with their knowledge of where  
16 the data are and how they can present it to us, we had  
17 a lot of good service from these guys and we -- Denny  
18 and I insisted that they take Winkler measurements.

19 That is an old, tried and true wet chemical  
20 determination for oxygen, and it's the basis -- a lot  
21 of people don't want to mess with it anymore, they  
22 want to trust their standardization of the oxygen  
23 probe without double-checking it against the wet  
24 method, but we insisted that they did.

25 We never heard back from them that there was

1 any problems and they continued to do that, as far as  
2 I know, and double-checked that data, and it looks to  
3 me like these data are valid.

4 Q. Now, Dr. Welch, during this investigation,  
5 did you ever discover any data that you felt was  
6 invalid?

7 A. Dr. Cooke has already described the Corps of  
8 Engineers phosphorus data. But when we first started  
9 on this project, the May samples for total phosphorus  
10 came in and they were too high. I was really suspect  
11 that these -- that we were getting bad numbers and --

12 Q. This is May of 2005?

13 A. 2005, May of 2005. So we didn't have any  
14 data from May of 2005 because we threw it out and we  
15 changed laboratories. We changed laboratories to  
16 the -- to the one in Seattle that I have confidence  
17 in, and so there was no doubt in my mind about  
18 phosphorus after that.

19 Q. Do you remember the questions that have been  
20 addressed to you about whether or not Broken Bow Lake  
21 was a good reference lake for Lake Tenkiller?

22 A. Do I remember questions about it?

23 Q. Yes.

24 A. Yes, I do.

25 Q. Okay. Do you have an opinion as to whether

1 or not Broken Bow Lake is a good reference lake?

2 A. I think it's a good reference lake.

3 Q. Why is that, sir?

4 A. Let me wet my whistle here.

5 Well, I've already said that the morphometric  
6 characteristics of Tenkiller and Broken Bow are  
7 similar. They're steep-sided basins. The mean depths  
8 are fairly similar. Broken Bow is a little deeper,  
9 it's a little over 19 meters, and Tenkiller  
10 is -- excuse me -- 15.6 meters. There's some other  
11 -- and the areas are similar, very similar, something  
12 over 50 square kilometers a piece.

13 There's some other things that you can look  
14 at. I calculated the volume in each lake below 6  
15 meters, and one is 88 percent of the volume, the other  
16 is 86 percent of the volume. And I calculated the  
17 volume of the hypolimnion, and Broken Bow has -- I  
18 think Broken Bow has 43 percent and Tenkiller 40  
19 percent or it might be the reverse.

20 These are very, very similar basins and  
21 should provide rocky drop-off areas for smallmouth  
22 bass to inhabit and walleye. Walleye need gravelly  
23 bottoms as well.

24 Q. Now, was there one factor in particular that  
25 was important to you in selecting Broken Bow as a

1 reference for Lake Tenkiller?

2 A. Well, as Dr. Cooke has emphasized, the  
3 basis -- the important thing, aside from these other  
4 characteristics, is that the inflow concentration over  
5 a three-year period was 27 micrograms per liter and  
6 the range was 15 to 38.

7 Q. You're talking about phosphorus, total  
8 phosphorus?

9 A. I'm talking total phosphorus entering through  
10 Mountain Fork River into -- into Broken Bow Reservoir.  
11 In Tenkiller, there was a nine-year average of 166.  
12 Now, this is spring through summer, not the annual.  
13 I've told you before the annual volume-weighted inflow  
14 to Tenkiller is 220-something, 227.

15 We don't have a full year of data in Broken  
16 Bow so we can't -- can't compare 227 against 27, so  
17 we're comparing it 166 against 27.

18 Q. Now, on this similar topic of comparing  
19 reservoirs and watersheds, do you recall -- I think it  
20 was Mr. McDaniel's questions to you yesterday --  
21 concerning whether watershed-to-lake-area ratios can  
22 explain the differences between Broken Bow and  
23 Tenkiller's trophic state? Do you recall that  
24 discussion?

25 A. Right. I do.

1 MR. MCDANIEL: Excuse me, Your Honor.  
2 That discussion was with Dr. Cooke. I didn't ask  
3 those questions of Dr. Welch.

4 MR. PAGE: Your Honor, my recollection  
5 is this same Tyson defendant exhibit was used for  
6 both --

7 THE COURT: My recollection is that  
8 someone asked a question of Dr. Welch of that. I  
9 don't know that it was Mr. McDaniel but someone did.

10 MR. PAGE: Might have been  
11 Mr. Chadick.

12 THE COURT: Yes, it was. Very briefly  
13 but he did ask. It was Mr. Chadick.

14 Overruled. Go ahead.

15 Q. (BY MR. PAGE) Okay. Do you believe that  
16 those ratios -- that watershed-to-lake-area ratios  
17 explain the difference in the trophic state between --

18 A. I do not think that.

19 Q. Why is that?

20 A. One can think of a way to look at that  
21 problem assuming that the land uses are the same in  
22 the two watersheds, and the only difference is the  
23 watershed-to-lake-surface ratio.

24 So right away you'd think that, well, the  
25 watershed is double in Tenkiller what it is in Broken



1 Bow, so there's going to be double the loading if the  
2 land uses are the same. And that's okay in terms  
3 of -- that's probably a reasonable assumption in terms  
4 of kilograms of phosphorus coming in per year.

5 However, that doubling of the watershed in  
6 Tenkiller also means it's the doubling into the water  
7 runoff. So if one is interested in what the inflow  
8 concentration would be, the volume-weighted inflow  
9 concentration, which is what determines the phosphorus  
10 concentration in the lake which is what determines the  
11 concentration of algae, then you've got to divide that  
12 loading by volume. And if you do that, even if the  
13 runoff is say 4/10 or 5/10 of the total rainfall, you  
14 come out with the same concentration if the land uses  
15 are the same. So double the watershed area does not  
16 explain the difference in concentrations 27 versus  
17 166.

18 Q. Between the two reservoirs?

19 A. Between the two reservoirs.

20 Q. Okay, sir. Do you recall the question about  
21 whether land use in and of itself explains the  
22 difference between Broken Bow and Tenkiller  
23 phosphorus?

24 A. Yes, I do.

25 Q. Do you believe that that provides an

1 explanation for the different trophic states?

2 A. Not if you look at land use as it's been  
3 studied, different types of land use, such as urban  
4 runoff. I've done this. I've studied in many lake  
5 situations urban runoff, pasture, forest, high  
6 density, low density, urban runoff.

7 What people use to do that -- and I've done  
8 that myself -- is you go in -- it's complicated to  
9 figure out how much phosphorus is coming from what  
10 kind of land use, but there's a lot of published data  
11 showing that there are runoff coefficients or yields  
12 in terms of mass of phosphorus coming off the  
13 different kinds of land uses per year.

14 But in addition to yields, there's been EPA  
15 surveys, and one was -- some of these results were  
16 published by EPA, Omernik -- McDowell and Omernik in  
17 1979, for example.

18 MR. MCDANIEL: Your Honor, I object.  
19 This is getting into hearsay, Your Honor.

20 THE COURT: Sustained.

21 Q. (BY MR. PAGE) Would you just explain your  
22 analysis of Broken Bow and Tenkiller?

23 A. Okay. I took representative stream runoff  
24 concentrations from different land uses, and I can  
25 specify those. On average, forest land use yields

1 water runoff with about 18 micrograms per liter on  
2 average. Rangeland that is -- or land use that has  
3 more than 50 percent rangeland is something like 34  
4 micrograms per liter.

5 MR. MCDANIEL: Excuse me, Your Honor. I  
6 have to object to this because this specific analysis  
7 here I don't believe is set forth in Dr. Welch's  
8 report.

9 THE COURT: Overruled. He's giving an  
10 overall perspective on land use and how it might  
11 affect trophic states.

12 Go ahead.

13 *(Discussion held off the record)*

14 A. So these are typical values. They  
15 range -- they vary from one site to the other, the  
16 standard deviations around these numbers. But 18 from  
17 forest, 34 from rangeland, and 92 from urban runoff.  
18 I've studied urban runoff. The urban runoff around  
19 Seattle has got about 100 micrograms per liter in it  
20 on average.

21 If we apply those to the land uses in the two  
22 watersheds and weight them for the land area in those  
23 two watersheds, you come out --

24 MR. MCDANIEL: Your Honor, this is an  
25 application to the specific watersheds at issue, Your

1 Honor. This is not a generalization. This is not set  
2 forth in his report. So I do object to this.

3 THE COURT: Any response, Mr. Page?

4 MR. PAGE: Your Honor, this is a  
5 response in response to the cross-examination that  
6 used this -- these land uses and asked him about the  
7 differences.

8 MR. MCDANIEL: That examination, Your  
9 Honor, was simply the basic attributes of the two  
10 watersheds. Individual analysis of loading from those  
11 land uses was not part of the cross and it's not part  
12 of his report.

13 THE COURT: I think it opens the door to  
14 this and naturally demands this type of response.  
15 Overruled.

16 Go ahead.

17 A. Anyway, if you take these average values and  
18 weight them according to land use, you come out with a  
19 value of about 21 micrograms per liter in the water  
20 going into Broken Bow and 32 going into Tenkiller. So  
21 I don't believe that land use alone explains the high  
22 concentration in the inflow of Tenkiller Reservoir.

23 Q. (BY MR. PAGE) And just to be clear, the 21  
24 for Broken Bow compares to what we're actually seeing  
25 there now as what?

1 A. Twenty-seven.

2 Q. And the -- what did you say for Tenkiller  
3 was --

4 A. Thirty-two.

5 Q. Thirty-two compares to what we're actually  
6 seeing in Tenkiller?

7 A. 166.

8 Q. Thank you, sir. Now, you've had chance this  
9 morning to talk about transectional sampling, and I  
10 believe you testified this morning --

11 A. Yes.

12 Q. -- that you felt that the -- that even though  
13 there were some samples that were down the deep part  
14 of the watershed, that you also did transectional  
15 sampling in order to evaluate the littoral zones or  
16 the edges of the reservoir; correct?

17 A. Right. We wanted to see if the profiles were  
18 taken in the -- at the main stations, if they could be  
19 extrapolated across the reservoir.

20 Q. Would you just briefly describe what was done  
21 to evaluate that?

22 A. There were, I think, six sites across the  
23 reservoir at the various stations, and if you plot  
24 these profiles from those different sites on  
25 top -- against each other, they fall -- they're very

1 similar in terms of oxygen and temperature. So it  
2 tells you that the thermocline is very constant  
3 horizontally at a constant depth across the reservoir.

4 This is typical in lakes. The thermocline is  
5 very stable unless there's extremely strong wind, and  
6 then you can get seiches in a large body of water that  
7 flop back and forth, but when the wind stops blowing  
8 that thermocline is very stable. In deep bodies of  
9 water like these reservoirs, you don't see the  
10 dropping of the thermocline until you start getting  
11 cooling in the fall then it -- then they start going.  
12 Otherwise, in the summertime when you got that warm  
13 water in the top, they're very stable.

14 Q. And you've testified you looked at Dr. Wells'  
15 modeling results of the temperature and DO?

16 A. I talked to him about it.

17 Q. Okay.

18 A. Well, yes, I've looked at his -- his -- his  
19 oxygen temperature profiles.

20 Q. Does that support your transectional  
21 analysis; that is, his modeling results support this  
22 transectional --

23 A. Well, his model just doesn't predict. I  
24 mean, it's a hydrodynamic model that predicts the  
25 oxygen, temperature distributions throughout the

1 basin, not just at the individual sites where we  
2 monitored.

3 So that also helps describe the consistency  
4 of the horizontal distribution of oxygen and  
5 temperature?

6 Q. Changing topics on you, Dr. Welch, you were  
7 asked about whether or not you looked at creel data as  
8 part of your evaluation of the fisheries; correct? Do  
9 you recall those questions?

10 A. Yeah.

11 Q. Okay. I don't know if you had a chance to  
12 answer why you chose not to focus on the creel data  
13 that was available for Lake Tenkiller and Broken Bow.  
14 Would you please explain?

15 A. Well, we did look at a lot of fisheries data,  
16 and there was -- there was not a consistent pattern  
17 that you could say that the sampling techniques and  
18 the effort were comparable across a long period of  
19 time.

20 And so we did a lot of work and plotted this  
21 information, but it just didn't allow us to -- to make  
22 any firm conclusions about -- about the status of the  
23 fishery.

24 Q. And finally, Dr. Welch, I think early on  
25 yesterday you were asked questions concerning whether

1 or not you validated Dr. Wells' modeling results, and  
2 you said you didn't look at the validations to my  
3 recollection.

4 Did you do anything yourself, sir, though, to  
5 evaluate the reliability of Dr. Wells' modeling  
6 results?

7 A. Well, I did. I stated that in -- in  
8 deposition, as I recall, and also it's in our report,  
9 that my -- I mentioned yesterday when I showed that  
10 line diagram that evaluated the seasonal change in the  
11 volume of habitat --

12 Q. Which diagram are you referring to here?

13 A. Well, it compared -- well, I can just tell  
14 you. It compared walleye, suboptimal, the volume for  
15 suboptimal conditions for walleye, the volume for  
16 optimal conditions and suboptimal conditions for  
17 smallmouth bass.

18 Q. Okay, sir. Can I just make sure for the  
19 record, is it -- if you just look, is it Oklahoma  
20 Exhibit 733?

21 A. That's it, yeah.

22 Q. Okay. Thank you, sir. Please continue.

23 A. So in the upper left-hand corner where there  
24 is suboptimal conditions, the June through -- the June  
25 through September average volume for suboptimal



1 conditions for smallmouth bass is -- average for  
2 2005-2006 averaged 25 percent for suboptimal. For  
3 optimal, it was ten percent for smallmouth. For  
4 walleye, it was less than 1 percent.

5 Q. And that's based on your observations?

6 A. That's on the observation data of 2005-2006.

7 Wells' model predicted for his ten-year  
8 average 8 percent for optimum for smallmouth, 33  
9 percent for suboptimal, and one and a half percent for  
10 walleye. So those estimates were very close to what  
11 we calculated for '05 and '06.

12 So I thought, Wow, this looks good. I think  
13 the model is doing pretty good on oxygen and  
14 temperature.

15 MR. PAGE: Your Honor, I pass the  
16 witness.

17 THE COURT: One question before recross.

18 Dr. Welch, the last question that Mr. Tucker  
19 asked you was with regard to the record smallmouth  
20 bass and the record striper.

21 Snake Creek is on the lower eastern part of  
22 the lake. Looks to me to be probably the largest  
23 creek coming into the lacustrine.

24 THE WITNESS: Okay. Near the dam.

25 THE COURT: Yes. Relatively.

1 It's -- it enters the lacustrine part of the lake.

2 Now, your answer to Mr. Tucker was that those  
3 fish came out of this fishery, and I was surprised  
4 frankly as to the answer because the striper came out  
5 of the lower Illinois River below the dam and above  
6 the Arkansas River.

7 THE WITNESS: That's what I found out  
8 later.

9 THE COURT: Now, is that area considered  
10 part of the same fishery?

11 THE WITNESS: I wouldn't consider it  
12 part of the same fishery.

13 THE COURT: All right. Well, that's  
14 why --

15 THE WITNESS: You mean the tailrace  
16 fishery?

17 THE COURT: Well, of course the tailrace  
18 to my understand is essentially where they have the  
19 trout.

20 THE WITNESS: The outflow, yeah.

21 THE COURT: Yes. And then the stripers  
22 are in the lower Illinois above the Arkansas River.

23 Is that part of the same fishery in your  
24 terms as that presented in Lake Tenkiller in the  
25 Illinois River above Lake Tenkiller?

1 THE WITNESS: No. Different habitat.

2 THE COURT: All right.

3 Cross-examination -- or recross.

4 **RECROSS-EXAMINATION**

5 **BY CHADICK:**

6 Q. Good morning, Dr. Welch.

7 A. Good morning.

8 Q. I want to make sure that I understand your  
9 testimony.

10 First of all, with regard to habitat --  
11 differences in habitat, prey availability, and  
12 interspecific competition, that can affect the  
13 smallmouth bass in the Tenkiller reservoir; correct?

14 A. Yes, yes. Largemouth as well.

15 Q. All right. And you did not study the  
16 differences in habitat, prey availability, or  
17 interspecific competition in either Tenkiller or  
18 Broken Bow; correct?

19 A. I did not study it, no.

20 Q. Also making clear -- I think you said this  
21 yesterday in your deposition. You did not know  
22 whether Dr. Wells' model had been validated; correct?

23 A. I don't -- let's see. I don't think it was  
24 validated.

25 Q. Okay.

1           A.    No.   By "validated," I mean you take a whole  
2   new set of data and check the model against the whole  
3   new set of data. I don't -- I don't believe it was.

4           Q.    And Mr. Page asked you about your comparing  
5   the DO profiles -- and I just want to make sure that I  
6   get these right -- you had referred to in redirect  
7   State's Exhibit 721 and 728. Can you pick those up,  
8   please?

9           A.    Yeah. I got them, I think. Yeah.

10          Q.    Okay. And so I'm looking first at State's  
11   Exhibit 721. Those are all profiles at LK-01 --

12          A.    Correct.

13          Q.    -- that site 01 in Tenkiller; correct?

14          A.    Right.

15          Q.    And then on State's Exhibit 728, there is the  
16   comparable site in Broken Bow, BBL-01, that's on the  
17   left-hand side of the page; correct?

18          A.    Yes.

19          Q.    And for the year 2005 in Tenkiller at site  
20   LK-01, you ran -- I believe I've counted these -- 12  
21   dissolved oxygen profiles; correct?

22          A.    True.

23          Q.    And that was from the period of time from May  
24   18, 2005, until November 16th, 2005; correct?

25          A.    True.

1 Q. And you are, as you described to Mr. Page,  
2 making a reference comparison of DO profile of  
3 Tenkiller to Broken Bow based upon one oxygen profile  
4 at BBL-01 in that same year, 2005; correct?

5 A. Let me see. There are no profiles in 2005  
6 from Broken Bow.

7 Q. Look at the very last -- is that not October  
8 17, 2005?

9 A. I didn't use that one to compare.

10 Q. You didn't even use it?

11 A. I used the July and August --

12 Q. Okay.

13 A. -- to try to get dates that were similar in  
14 the two bodies of water.

15 Q. So if I understand you then, you had 12  
16 oxygen profiles run at LK-01 in 2005, and you compared  
17 that to zero dissolved oxygen profiles at BB-01 in  
18 2005; correct?

19 A. Yes.

20 Q. And just in terms of that sampling, of  
21 course, the 2005 sampling was the product of work from  
22 CDM and none of your BBL profiles that you looked at  
23 was the result of sampling from CDM; correct?

24 A. No, that's correct. We could look at  
25 October, though, if you want to.

1 Q. Well, I'm just wanting to make sure for  
2 purposes of your redirect examination to Mr. Page that  
3 I'm covering what I understand.

4 A. Okay.

5 Q. And, again, you don't know about the sampling  
6 efforts and how they got these DO profile data for any  
7 of these years on State's Exhibit 728, right, because  
8 it wasn't CDM?

9 A. Well, I mean, I see the results. They went  
10 out with a -- I mean, I don't know what kind of a  
11 probe they used, but these -- they measured oxygen  
12 with depths and they reported the results so I'm  
13 taking them at face value.

14 Q. And then you had discussed yesterday about  
15 the habitat squeeze and your concern with the  
16 smallmouth bass being habitat-squeezed in June through  
17 August when growth is prohibited, in your opinion;  
18 correct?

19 MR. PAGE: Your Honor, this goes beyond  
20 the scope of my redirect.

21 THE COURT: I believe it does. I don't  
22 believe he went into that in redirect.

23 MR. CHADICK: Okay. I'm sorry.

24 Q. (BY MR. CHADICK) Let me just see if this  
25 hits on your direct. I was trying to lead up to it,

1 your redirect.

2 Is April when that record smallmouth bass was  
3 caught the growing season?

4 A. They're going to -- the growth is temperature  
5 controlled so they don't -- they won't be growing at  
6 temperatures beyond 29 for sure and it will be -- be  
7 reduced.

8 And so as soon as -- so temperature also keys  
9 when they reproduce. So when the temperature reaches  
10 some level in their optimum, then that's when they  
11 start to feed and reproduce. Well, I know crappie  
12 come in close to shore. The temperature is 60 degrees  
13 Fahrenheit when you start fishing. So it controls  
14 their reproduction and their growth.

15 MR. CHADICK: Thank you, Dr. Welch.

16 THE COURT: Further recross?

17 MR. MCDANIEL: Yes, Your Honor.

18 THE COURT: Mr. McDaniel.

19 **RECROSS-EXAMINATION**

20 **BY MR. MCDANIEL:**

21 Q. Good morning, Mr. Welch.

22 A. Good morning.

23 Q. When you came down here, did you think you'd  
24 still be enjoying our fine city on Wednesday?

25 A. You know how long I've been here?

1 Q. Yeah, I do.

2 A. Yeah.

3 Q. I do. That's why I asked. And your tone of  
4 voice says it all.

5 A. I'm looking for my mail every day at the  
6 motel.

7 Q. Has it shown up yet?

8 A. My wife is not as mad as Cooke's is, though.

9 Q. Well, I'm sure he's going home a happy man  
10 so I -- all right. Let me touch upon a couple points.

11 With Mr. Page, he asked you whether the  
12 differences in watershed area explained the  
13 differences in the concentration of phosphorus in the  
14 streams.

15 A. Uh-huh. Yes.

16 Q. And you answered the question saying all else  
17 being the same, the watershed-to-lake ratio does not  
18 explain the concentration. Is that your testimony?

19 A. It is.

20 Q. All right. But --

21 A. All other things being the same, like land  
22 use, you mean?

23 Q. Correct. That's what I understood your  
24 testimony to be.

25 A. Right.



1 Q. But if the question is phosphorus load, the  
2 mass of phosphorus that goes into the two reservoirs,  
3 all things being the same, watershed area, because  
4 there is a greater volume of runoff from a bigger  
5 ratio watershed, it does explain a difference in the  
6 load, doesn't it?

7 A. If the land use were the same and the slopes  
8 were the same and all this, yes, you'd get more load.

9 Q. Okay. These dissolved oxygen plots in your  
10 report that you've discussed, those were actually  
11 prepared by -- is it Dr. Santini or Drew Santini?

12 A. Drew Santini. Either him or Brian Bennett.  
13 I'm not sure which one does this.

14 Q. From Camp, Dresser & McKee; correct?

15 A. Yes.

16 Q. Did they actually provide you the actual  
17 results data from the dissolved oxygen?

18 A. Yeah. We've got raw data from the DO.  
19 Everything we used in our report is in our appendix.

20 Q. You mention this alternate process that you  
21 insisted that they run for dissolved oxygen. What did  
22 you call that?

23 A. The Winkler test.

24 Q. Winkler?

25 A. Goes back to 1800 and something.

1 Q. All right. Did you actually receive the  
2 original raw Winkler data?

3 A. No, I have not received the raw Winkler data.

4 Q. Okay.

5 A. It was used to, you know, compare and make  
6 sure they were close -- that the probe measurement was  
7 close. I mean, it's a way to standardize.

8 Q. Okay. But they never provided it so you  
9 don't know what it shows?

10 A. No, I do not know what it shows.

11 Q. Now, let's talk briefly about this analysis  
12 you did where you said you area-weighted three land  
13 uses -- forest, range, and urban -- between the two  
14 watersheds.

15 A. Uh-huh.

16 Q. And if you understood your testimony, you  
17 applied sort of a standardized coefficient for runoff  
18 that you've either developed through your own research  
19 or from the literature?

20 A. Well, I did that also but this was more  
21 simple. I just said, here are the concentrations in  
22 water running off of this land use, and I took those  
23 concentrations and weighted them for that amount of  
24 land use.

25 For example, the highest concentration 92,

1 for example, and there's 7 percent land use in urban  
2 area in Tenkiller. So I just -- I weighted it that  
3 way.

4 Q. Well, let's talk about the urban.

5 Now, obviously we've had several of the other  
6 state's experts have testified and we've talked about  
7 lots of different types of sampling and data that have  
8 been generated in the course of this investigation.

9 But my recollection of the testimony is that  
10 no one actually sampled urban storm water runoff in  
11 the Illinois River Watershed to either determine  
12 concentration or loading. Have you seen any such  
13 data, sir?

14 A. Engel's -- as far as the rangeland, the range  
15 value I used was -- was 34. And Engel's cited some  
16 work from --

17 Q. I want to know about measured data from this  
18 watershed. That's my question.

19 A. I don't know of any.

20 Q. Okay. So what you used in this analysis you  
21 testified to with Mr. Page this morning was not based  
22 upon data from the Illinois River?

23 A. It was not.

24 Q. Okay. Now, when you analyzed those -- or did  
25 your analysis of those three land uses, you didn't

1 consider the nurseries in the Illinois River  
2 Watershed, did you, sir?

3 A. I did not.

4 Q. Now, when you gave your deposition in this  
5 case, you recall being asked about the big Greenleaf  
6 Nursery?

7 A. I do.

8 Q. And at that time, you were not familiar that  
9 that facility existed in the Illinois River Watershed,  
10 were you?

11 A. I think I said no. I can't remember what I  
12 said. I think I asked somebody afterwards. I asked  
13 Engel about it.

14 Q. It's your understanding that that nursery  
15 sits right beside the lake up in the upper zone?

16 A. I assume that it does, yes.

17 Q. Okay.

18 A. I actually haven't looked at it so I -- I  
19 know it's on the shore somewhere.

20 Q. Well, and you use this analysis of these  
21 three land uses in your discussion with Mr. Page to  
22 say that those three land uses don't explain the  
23 difference between 21 micrograms per liter in Broken  
24 Bow and 32 micrograms per liter in Tenkiller, can't be  
25 explained by those three land uses.

1           That was your testimony; right?

2           A. I didn't say that. I said I used -- I used  
3 the percentages of land use that were presented to  
4 Cooke and I by Robert Van Waasbergen, and they're in  
5 our report, and it's 7 percent urban and, I think, 43  
6 percent forest, and the rest were pasture in  
7 Tenkiller.

8           I took those numbers and I was only trying to  
9 illustrate and discuss this issue of different land  
10 uses in the two watersheds as explaining the -- you  
11 know, aside from any other waste going on these lands  
12 and aside from wastewater or anything else, can this  
13 explain the difference between 27 and 166? That's the  
14 reason I did it. Just the expected runoff from those  
15 kinds of land uses, on average, doesn't do it.

16          Q. All right. That's how I understood your  
17 testimony.

18          A. Yeah. And no, it doesn't include any other  
19 kinds of sources.

20          Q. Well, and that's -- that's my next question,  
21 sir.

22               That analysis that you just gave us doesn't  
23 consider the 31 million gallons a day of treated  
24 wastewater dumped into the streams of the Illinois  
25 River Watershed by the sewage plants versus --

1 A. It does not.

2 Q. -- the less than one-tenth of a million a  
3 gallon a day in Broken Bow, does it?

4 A. It doesn't.

5 Q. All right. Those are my questions. Thank  
6 you, sir.

7 THE WITNESS: Okay.

8 THE COURT: Any further recross?

9 MR. TUCKER: No, thank you.

10 MR. ELROD: No, Your Honor.

11 THE COURT: Doctor, one more question.  
12 I presume I know the answer to this.

13 You've not done any follow-up on your  
14 previous work at Eucha-Spavinaw, I take it; correct?

15 THE WITNESS: Correct.

16 THE COURT: And that wasn't an area you  
17 were asked to look at in the context of this lawsuit?

18 THE WITNESS: True.

19 THE COURT: All right. Very well. You  
20 may be excused.

21 The state may call its next witness.

22 MS. MOLL: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MS. MOLL: May it please the court,  
25 Judge, I'm sorry to say that this won't be nearly as

1 fun as listening to Dr. Welch.

2 THE COURT: All right.

3 MS. MOLL: But there are two  
4 stipulations that the state has reached with various  
5 defendants that need to be reflected on the record.

6 THE COURT: All right.

7 MS. MOLL: Perhaps we could get through  
8 those before our break.

9 THE COURT: Please.

10 MS. MOLL: And this will suspend the  
11 need to move into evidence a handful of exhibits, and  
12 this relates to certain of the state's claims  
13 requiring proof that a defendant is a person or a  
14 corporation.

15 THE COURT: All right.

16 MS. MOLL: So the first is -- and I  
17 see Mr. George is in the courtroom. He has agreed to  
18 stipulate on the record that Tyson Foods, Inc., Tyson  
19 Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress,  
20 Inc. are corporations. I would ask Mr. George to  
21 acknowledge his agreement on the record.

22 THE COURT: Mr. George.

23 MR. GEORGE: More Christmas spirit, Your  
24 Honor. I struggled with that request but that's  
25 agreed.

1 THE COURT: Thank you. Ms. Moll.

2 MS. MOLL: The second stipulation is  
3 that Mr. McDaniel has agreed to stipulated on the  
4 record that Peterson Farms, Inc. is a corporation.

5 THE COURT: Mr. McDaniel.

6 MR. MCDANIEL: It took us 12 e-mails,  
7 Your Honor, but I agree.

8 THE COURT: Thank you.

9 MS. MOLL: It was close to 12.

10 Your Honor, we have another matter to take  
11 up. I don't know if you want me to get into it now,  
12 it's going to take some time, or whether or not you  
13 want to take the morning break now. It's your  
14 pleasure.

15 THE COURT: Well, why don't you give me  
16 a heads-up on whatever it is.

17 MS. MOLL: Okay. The state would like  
18 to move into evidence a series of records from ODAFF.  
19 We do not have a foundation witness for it because we  
20 have a declaration signed by Mr. Dan Parrish from  
21 ODAFF pursuant to Federal Rule of Evidence 902(11).  
22 So I'm happy to get into that now but it's your  
23 pleasure.

24 THE COURT: All right. How many records  
25 are we talking about?



1 MS. MOLL: There are a couple dozen, I  
2 believe, Your Honor.

3 THE COURT: All right. And I take it  
4 here that there is no stipulation as to this matter;  
5 correct?

6 MS. MOLL: That is correct. We tried to  
7 obtain one but that was not successful.

8 Shall I go ahead and distribute the exhibits,  
9 Your Honor?

10 THE COURT: Please. All right. This is  
11 all regularly-conducted activity issues; correct?

12 MS. MOLL: Yes, sir.

13 THE COURT: And I take it that the  
14 defendants dispute whether or not the activities were  
15 regularly conducted?

16 MR. HOPSON: No. I think the activities  
17 were as regular as can be, Your Honor. I have a  
18 different objection.

19 THE COURT: All right.

20 MR. HOPSON: I have an objection that  
21 dumping in hundreds of pages of soil test phosphorus  
22 results that are not representative, not random, not a  
23 statistical sample, not tied to any expert testimony  
24 is simply irrelevant.

25 If they want to put these into evidence, I

1 can assure you they can put Mr. Parrish on the stand,  
2 ask him three questions, and they can come into  
3 evidence if you overrule my relevance objection. But  
4 at that point, I want to interrogate Mr. Parrish about  
5 how these documents were selected, who selected them,  
6 and what they're supposed to represent.

7 Because all we really have here is a  
8 selection by plaintiff's counsel of the highest STP  
9 soil test phosphorus results they could find on  
10 certain growers' farms. The same growers have very,  
11 very low soil test phosphorus results on other fields  
12 which also goes to the relevance of this whole  
13 exercise.

14 MR. TUCKER: Your Honor --

15 THE COURT: Yes.

16 MR. TUCKER: -- if I may be heard as  
17 well.

18 In addition to the objection Mr. Hopson makes  
19 under Rule 106, which talks about the remainder of  
20 related writings, it's our position that that applies  
21 to if you have a grower file, then other documents in  
22 that grower's file are equally important as a part of  
23 the record that's being offered. The example given by  
24 Mr. Hopson was that -- that growers would have a  
25 different STP, a lower STP on other fields.

1           The point Mr. Hopson did not make is, for  
2           example, on one of the exhibits the state choose to  
3           offer, that particular grower has a lower STP on that  
4           field for every year before and every year afterward  
5           one particular soil sample was taken, and lower by a  
6           factor of 90 percent, indicating a clear aberration  
7           for that one test. Yet, the state only proposes to  
8           submit the one test which clearly does not fit the  
9           rest of all the tests in that particular field.

10           Additionally, the way in which the state  
11           chooses to admit this, we believe that there is  
12           a -- it is a hearsay issue. Because if you look at  
13           the description of records of regularly-conducted  
14           activity, documents that are being offered by the  
15           state include, for example, a filing made by a farmer  
16           with the state which contains in there the farmer's  
17           understanding of a soil test received from yet a third  
18           party. So it's hearsay within hearsay which is going  
19           to be offered by this particular person.

20           Additionally, the --

21           THE COURT: Now, let me understand here.

22           You say the farmer's understanding of a soil  
23           test received from --

24           MR. TUCKER: A third party.

25           THE COURT: -- a private third party?

1 MR. TUCKER: That's correct. Or in many  
2 instances, it's Oklahoma State University. But that's  
3 the farmer's entry on an Oklahoma state form of data  
4 which he obtained from yet a third party, which is  
5 being offered by the state for proof of the matter  
6 asserted, which is the soil test phosphorus level on  
7 that particular field to demonstrate a high level at  
8 that time on that filing.

9 THE COURT: Well, remind me how these  
10 records are typically gathered. Does the state itself  
11 do these STP tests?

12 MR. TUCKER: No.

13 THE COURT: That was my recollection,  
14 that the farmer sends these out to the OSU labs and  
15 then the farmer reports those results back to the  
16 state; correct?

17 MR. TUCKER: That's correct, on the  
18 annual report the farmer fills out, which includes  
19 data which the farmer knows about. It also includes  
20 data which the farmer is merely using by reporting the  
21 hearsay from a third party.

22 THE COURT: Right. But that's the  
23 regular conduct of these records; correct? In other  
24 words, that's the way these records are put together  
25 normally?

1 MR. TUCKER: It is the regular -- the  
2 way these records are regularly performed, that is  
3 correct.

4 THE COURT: Well, what makes it  
5 unreliable?

6 MR. TUCKER: Well, I don't know that  
7 it's unnecessarily unreliable but it is hearsay within  
8 hearsay.

9 An example of the potential unreliability of  
10 it is the way in which the state chooses to offer it.  
11 By referring back to section 2, rule 102, in which  
12 they're offering only a particular slice of the record  
13 without any opportunity -- the way it's being proposed  
14 by Ms. Moll, it's being offered without any  
15 opportunity to determine how that slice was selected  
16 and what the other slices of the pie look like.

17 THE COURT: Well, of course that goes  
18 back to Mr. Hopson's objection?

19 MR. TUCKER: Yes, it does.

20 THE COURT: And that's really a  
21 different objection than hearsay.

22 MR. TUCKER: Those are two different  
23 objections, that's correct, Your Honor.

24 THE COURT: All right. Anything else?

25 MS. MOLL: Your Honor, if I may respond?

1 MR. WEEKS: May I speak, Your Honor?

2 THE COURT: Of course, sir.

3 MR. WEEKS: Thank you. On behalf of  
4 George's, Your Honor, I would like to simply reiterate  
5 what has already been brought to the court's  
6 attention, and that is that the documents that the  
7 state seeks to introduce here are selective and  
8 cherry-pick documents from some -- not all -- but some  
9 of the various growers in the Illinois River  
10 Watershed. So what we're seeing here is not  
11 representative of anything other than STP levels by  
12 which the state would like to misrepresent the facts  
13 to the court.

14 And as I understand it, Rule 106 requires  
15 fairness in the introduction of these kinds of  
16 documents. And so to the extent that the state is  
17 interested in STP levels that exist in the Illinois  
18 River Watershed, then I would strongly urge the court  
19 that fairness would require that all of the records  
20 come in, and specifically all the records as it  
21 relates to -- all the STP level records as it relates  
22 to the growers that the state is attempting to use  
23 here.

24 In addition to that --

25 THE COURT: Well, even if that were the

1 case, it arguably wouldn't be a random or  
2 statistically-selected sampling.

3 MR. WEEKS: It would not, Your Honor.  
4 But, however, with regard to that grower who's going  
5 to be painted with some brush here today --

6 THE COURT: You're saying at the very  
7 least, all the records relative to that grower ought  
8 to be presented?

9 MR. WEEKS: That particular grower,  
10 that's correct.

11 THE COURT: But that doesn't address all  
12 of Mr. Hopson's objection, 106 objection.

13 MR. WEEKS: It does not. And the  
14 question of relevance is still there and the question  
15 of the fact that they may and probably are misleading  
16 in that respect is still there.

17 I'm not necessarily urging that on the court.  
18 I'm just pointing out in the -- if the court does  
19 decide to accept some of these documents, that in  
20 fairness that would at least be one option or  
21 alternative.

22 I would like to further point out that with  
23 regard to George's the state has selected documents  
24 from a grower by the name of Martin Bayer, B-a-y-e-r.

25 Now, Mr. Bayer's documents are all

1 indicate -- all indicate that he is located in the  
2 Eucha-Spavinaw Watershed. And so for that reason,  
3 these documents are certainly not relevant here in  
4 this proceeding.

5 Now, when we brought this to the attention of  
6 the state, what we were told was, well, you know,  
7 we're going to bring Mr. Parrish in here and by fiat  
8 he is going to declare that no, Mr. Bayer is now in  
9 the Eucha -- or in the Illinois River Watershed.

10 Well, you know, Mr. Parrish ain't here today  
11 and they say he ain't going to be here today. And so,  
12 you know, we have the question of, you know, where is  
13 Mr. Bayer's farm and why is it now that they want to  
14 put those records in? Furthermore --

15 THE COURT: My recollection is that  
16 these forms themselves identify which watershed the  
17 farms are in.

18 MR. WEEKS: They do indeed, Your  
19 Honor.

20 THE COURT: Have you looked at the  
21 records that the plaintiff seeks to introduce to  
22 see --

23 MR. WEEKS: It says "Eucha" right on his  
24 farm management plan, "Eucha."

25 THE COURT: Okay.



1 MR. WEEKS: But as I said, we were -- we  
2 were informed that Mr. Parrish was going to appear  
3 here today and declare that no, he's not in Eucha, but  
4 rather he's in the Illinois River Watershed.

5 I would further point out -- and the state  
6 knows this as well -- that the reason they want this  
7 guy in here is because he has one field that has a  
8 high STP level that was determined in 2002 when  
9 Mr. Bayer was actually buying the farm. He had no  
10 history with that farm. George's has no history with  
11 that farm.

12 The only history is that there was an attempt  
13 to purchase -- or he did purchase this farm in 2002,  
14 and on a field there was a high STP level. Now they  
15 want to hang that value on our neck and that's unfair.

16 THE COURT: Is he a George's grower?

17 MR. WEEKS: He is indeed a George's  
18 grower, and has been since 2002 when he bought the  
19 farm. But the STP level predates him ever purchasing  
20 that farm.

21 THE COURT: You say your understanding  
22 is that he's in Eucha-Spavinaw?

23 MR. WEEKS: That's what the state's  
24 documents say.

25 THE COURT: Does it straddle the

1 watersheds.

2 MR. WEEKS: It doesn't say it straddles  
3 the watershed.

4 THE COURT: All right. Anything  
5 further?

6 MR. WEEKS: Nothing further, Your Honor.

7 THE COURT: Okay. Any other objections?  
8 Ms. Moll, you stirred things up.

9 MS. MOLL: Mr. Elrod promises this was  
10 going to be a dust-up and it is indeed.

11 MR. TUCKER: My lawyer advised me,  
12 knowing me for the scholar that I am not, that I  
13 missed the main point of this whole issue.

14 THE COURT: I've been accused of the  
15 same, Mr. Tucker.

16 MR. TUCKER: He suggests that I direct  
17 the court's attention to Rule 902 having to do with  
18 self-authentication, and in particular subparagraph  
19 (11), which has to do with certified domestic records  
20 of regularly-conducted activities which is what it is  
21 the plaintiff wants to do here.

22 The point is made that it's required that the  
23 certification be made by a person who has the ability  
24 to certify that the record was made at or near the  
25 time of the occurrence of the matters set forth or

1 from information transmitted by a person with  
2 knowledge of those matters. And it's pointed out that  
3 Mr. Parrish is not and cannot be that person.

4 Thank you, sir.

5 THE COURT: And remind me of  
6 Mr. Parrish's position.

7 MR. TUCKER: Mr. Parrish is --

8 MS. MOLL: As you can see, Your Honor,  
9 on the declaration that he signed, he says, "I am the  
10 director of agricultural, environmental management  
11 services for the Oklahoma Department of Agriculture,  
12 Food and Forestry."

13 THE COURT: Now, where is that in this  
14 document?

15 MS. MOLL: Oh, I'm sorry. Forgive me,  
16 Your Honor. It should be on the inside cover of the  
17 binder.

18 THE COURT: Oh, here it is. So he's the  
19 director.

20 MS. MOLL: And he goes on to say -- and  
21 I'm still in the first paragraph on the third line --  
22 I am the custodian of ODAFF's records kept under the  
23 Oklahoma Registered Poultry Feeding Operations Act and  
24 the Oklahoma Poultry Waste Applicator Certification  
25 Act. All of the facts stated herein are based on my

1 personal knowledge of ODAFF's recordkeeping  
2 practices.

3 MR. TUCKER: And he would know that,  
4 Your Honor, with regard to ODAFF's recordkeeping  
5 practices but he would have no knowledge of how, when,  
6 or under what circumstances the document which he  
7 chooses to certify was made as to the time it was done  
8 or whether the person who made it actually had  
9 knowledge of those matters. It would only be the  
10 person who had made the record.

11 The comments of that rule points out and  
12 Weinstein points out that has to do with records that  
13 are generated and kept by the agency, as opposed to  
14 something that comes in from the outside.

15 THE COURT: All right. It wouldn't  
16 necessarily be the person who made the record, it  
17 would be the person who gathered the record or was the  
18 actual custodian in your view?

19 MR. TUCKER: Well, no. For example,  
20 with respect to the agency, he would know that this is  
21 the kind of record that is prepared by -- ordinarily  
22 prepared by a member of his agency, not by some  
23 outside person. He could then certify that that's  
24 something that -- he would know that because he would  
25 know that his person does it, does it when the call

1 comes in, the call log is prepared, and then the call  
2 log is preserved. For example, a 911 log is a good  
3 example of that. The director of that agency would  
4 know how that's done.

5 This is like someone mailing in 911 records  
6 from somebody's house scattered in various parts of  
7 the countryside. He would have no idea who actually  
8 made it, who actually completed it, and under what  
9 circumstances or when it was done. So he would not  
10 have the ability to do that.

11 That self-certification is intended to  
12 certify records of the agency. It is not intended to  
13 certify records that come into the agency from  
14 someplace else.

15 THE COURT: All right. Well, let me  
16 recess, we'll take a look at 902(11) here because this  
17 is hitting me cold, and I'll try to get a better grasp  
18 of the outlines of 902(11) and 106 and we'll be back  
19 when that's done.

20 MS. MOLL: Thank you, Your Honor.

21 *(Short break)*

22 THE COURT: Ms. Moll.

23 MS. MOLL: Thank you, Judge. So quite a  
24 few objections obviously have been lodged before I got  
25 too many words out, so if you'll bear with me as I go

1 through them.

2 THE COURT: Yes.

3 MS. MOLL: So the first objection that I  
4 heard was on relevance grounds. These documents -- I  
5 want the record to be very clear on what these are.

6 As Your Honor knows, ODAFF maintains what  
7 we've been calling grower files and -- I'm not hiding  
8 it. This is a subset obviously of grower files.  
9 The --

10 THE COURT: I didn't even hear relevance  
11 as an objection frankly.

12 MS. MOLL: Mr. Hopson did.

13 MR. HOPSON: I did.

14 THE COURT: All right. Go ahead.

15 MR. HOPSON: Probably not very  
16 effectively but I intended to lodge that.

17 THE COURT: All right.

18 MS. MOLL: So this is a subset of grower  
19 files and they're relevant --

20 THE COURT: Excuse me. Mr. Overton,  
21 having many more years of experience than any of us  
22 here frankly in the courtroom, suggested that we refer  
23 to what we're talking about.

24 These are Exhibits 2644-A and --

25 MS. MOLL: Your Honor, there's quite a

1 long list. I'm happy to go through the numbers for  
2 ease of the record, if you'd like me to.

3 THE COURT: Well, there are quite a few.  
4 Let's do that here.

5 MS. MOLL: Okay.

6 THE COURT: 2660-A, 2685-A, 2686-A,  
7 2688-A, 2690-A, 2695-A, 2703-A, 2707-A, 2729-A,  
8 2730-A, 2739-A, 2740-A, 2768-A, 2772-A, 2774-A,  
9 2780-A, 2798-A, 2815-A, 2821-A, 2825-A, 2830-A,  
10 2831-A, 2835-A, 2847-A, 2855-A, 2856-A, 2857-A,  
11 2858-A, 2860-A, 2861-A, 2864-A, 2868-A, 2879-A,  
12 2880-A, 2885-A, 2890-A, 2891-A, 2899-A, 2907-A,  
13 2914-A, 2926-A, 2928-A, 6063-A, 6942-A, and Cargill 79  
14 and Cargill 87.

15 Does that cover it?

16 MS. MOLL: There was one, I think, you  
17 may have missed at the beginning, Your Honor. So just  
18 so the record's clear, it would be the first --

19 THE COURT: All right. You're right.

20 MS. MOLL: The first two are Oklahoma  
21 Exhibit 2565-A and 2644-A. I think you may have  
22 skipped one of those.

23 THE COURT: All right. Thank you very  
24 much. Just so the record's clear. Go ahead.

25 MS. MOLL: Okay. So on the relevance

1 point, what we have selected and are moving to admit  
2 are a subset of these grower files. What they show is  
3 soil test results of poultry-growers in the IRW with  
4 STPs in excess of any agronomic need, which supports  
5 the state's contention which poultry waste has been  
6 overapplied in the IRW. These records link a  
7 particular grower to an integrator and so I think that  
8 the relevance quite frankly should be obvious.

9 If I could take a step back, Your Honor, and  
10 give you a little bit of background on these type of  
11 exhibits and how we got to where we are, I think it  
12 might be helpful.

13 THE COURT: All right. First of all,  
14 the relevance objection is overruled.

15 Go ahead.

16 MS. MOLL: So during the motion in  
17 limine proceedings, which seems like years ago by now  
18 quite frankly, but there was an argument about kitchen  
19 sink exhibits. I don't know if Your Honor recalls  
20 that.

21 But one of the defendant's arguments was that  
22 there was numerous exhibits on the state's exhibit  
23 list which they described as kitchen sink exhibits,  
24 that there was no way that these exhibits would be  
25 offered in their entirety simply because of their



1 volume.

2 During that hearing, one of the defendant's  
3 counsel argued that the ODAFF files fell in that  
4 category. And moving ahead a little bit --

5 THE COURT: But there's a balance quite  
6 frankly.

7 MS. MOLL: Of course.

8 THE COURT: I mean, let's cut to the  
9 chase. I mean, obviously ODAFF records might fill a  
10 couple of rooms.

11 MS. MOLL: That's right.

12 THE COURT: They're absolutely  
13 impossible for one fact-finder to deal with. The  
14 question is really a 106 question: What in fairness  
15 needs to be produced here? And there seems to be a  
16 bit of a difference of opinion amongst defense  
17 counsel.

18 Now, with respect to counsel's request that  
19 the person be brought here personally, obviously as to  
20 902(11), if I had Mr. Hopson's cross-examination  
21 skills, he could cross-examine Mother Teresa and make  
22 her look bad. I understand his desire to  
23 cross-examine, but obviously 902(11) allows a  
24 custodian to make a written declaration. So 902(11)  
25 permits this exercise. It would appear to me that

1 that objection needs to be overruled as well.

2 The question here really cutting to the chase  
3 is 106. I understand we don't want the kitchen sink  
4 here, but the question is -- and there's a lot of  
5 discretion under Section 106 as to what in fairness  
6 should be presented to show a fair and representative  
7 picture.

8 It seems to me from the few minutes that I've  
9 been given during the break to discuss with a couple  
10 of the bright minds back in chambers, it seems to me  
11 that instead of a statistically representative sample,  
12 which would frankly take you all quite a bit of time  
13 to try to develop in terms of how that should be done,  
14 it would seem to me frankly that the complete file as  
15 to the growers that you want to present a picture  
16 about ought to be presented.

17 What's your response there?

18 MS. MOLL: My response to that, Your  
19 Honor, is the defendants are free to call Mr. Parrish  
20 in their case and --

21 THE COURT: But that's not what 106  
22 says. 106 doesn't impose that burden on the other  
23 side. All 106 requires is that they show that, A, the  
24 truncated version is misleading; and secondly, the  
25 material required to be admitted for completeness. I

1 think they've already done that.

2 MS. MOLL: Well, my response, Your  
3 Honor, would be that what you have in your binder  
4 before you with all the exhibits is not misleading  
5 because it reflects the purpose for which they're  
6 offered. They are simply offered for the reason I  
7 stated, which is to show excessive STPs.

8 I don't think we're under any obligation to  
9 do any kind of, you know, sampling or anything like  
10 that.

11 THE COURT: I'm not saying you are. I'm  
12 saying that it appears to me that with respect to  
13 these growers, because given the insight that you've  
14 given the court from what's been presented thus far,  
15 it's not necessary that you -- that you show a  
16 representative sampling because obviously you may have  
17 excess application of poultry litter in this area,  
18 whereas the field next to it may be pristine, and if  
19 you're correct, you have phosphorus coming off that  
20 field in runoff arguably making it to the stream, the  
21 reservoir.

22 So you don't have to show a representative  
23 sample from across the IRW. It just seems to me you  
24 need to be able to show me the complete picture with  
25 regard to that grower to, in fairness, address the

1 considerations presented by Mr. Tucker. There's been  
2 testimony here that the sampling STP tests aren't  
3 always perfect, that you may have a flier in terms of  
4 a test.

5 It seems to me that, in fairness, you ought  
6 to present records with regard -- and the complete  
7 records with regard to that particular grower so we  
8 can get a fair picture of what's happening as to that  
9 grower.

10 I was presented this at 11:10, and having  
11 looked a little bit at Weinstein, that seems to me,  
12 Section 106.02(1), that fairness requires presentation  
13 of all records from those growers referenced by the  
14 records to give a complete picture of the truth as to  
15 STP loading by that grower.

16 Mr. Hopson.

17 MR. HOPSON: Just a quick observation,  
18 Your Honor.

19 When you say "all records," I take it you  
20 mean all STP soil test phosphorus records in the  
21 grower files? And I raised this because of the burden  
22 on the court.

23 THE COURT: No. That's what I intended,  
24 yes.

25 MR. HOPSON: All right. That's just a

1 point of clarification.

2 MR. TUCKER: Your Honor, if I may, as a  
3 part of that point of clarification, one of the issues  
4 that's raised by the state, for example, Ms. Moll said  
5 we want to show that they have high STP litters caused  
6 by the application of poultry litter.

7 For example, with regard to one of the  
8 growers that they have listed in the long list of  
9 exhibits they read to you, they do indeed show a high  
10 STP record. But not in the STP records, but in the  
11 grower's annual registration forms it shows no litter  
12 as been applied to that field. So the state's  
13 conclusion would be invalidated by the balance of that  
14 grower's file.

15 But that would not be contained just in the  
16 STP records, that would be contained in the grower's  
17 annual statement. It's more broad than just the STP  
18 records.

19 THE COURT: Well, how far back do the  
20 STP records exist, Mr. Tucker?

21 MR. TUCKER: Well, the statute went into  
22 effect in 1998, and the grower records -- the grower  
23 files essentially began following that time when the  
24 grower first made an application -- I mean '98 -- when  
25 the grower first applied for a Nutrient Management

1 Plan.

2 By way of --

3 THE COURT: Have you looked at that  
4 particular grower's file?

5 MR. TUCKER: Yes, Your Honor.

6 THE COURT: All right. And you're  
7 saying from the very outset there are high STP  
8 results?

9 MR. TUCKER: The first soil test showed  
10 a high STP result. And then all the years that  
11 follow, one of the things that we would have presented  
12 to Mr. Parrish, if the state offered Mr. Parrish, to  
13 let him look at each of the reports as filed and  
14 approved by the state inspector every year since that  
15 first soil test that demonstrates that litter has  
16 never been applied to that property.

17 THE COURT: Well, it doesn't mean that  
18 litter wasn't applied before; correct?

19 MR. TUCKER: No. But there's no  
20 evidence that it was.

21 THE COURT: Right. And I understand we  
22 don't have complete records going back to the 40s.

23 MR. TUCKER: The Garden of Eden for this  
24 project starts with each grower when they apply for  
25 their Nutrient Management Plan. That would be the 7th

1 day.

2 THE COURT: Go ahead.

3 MR. WEEKS: I would just point out to  
4 the court that in addition to the STP results  
5 themselves, that there are other documents in the file  
6 that I think are relevant and important to the case.

7 For example --

8 THE COURT: Well, they may be relevant  
9 to the case. But the question is, what would be  
10 required for completeness as to this issue?

11 MR. WEEKS: Well, I think in fairness,  
12 it would be imminently fair to take into account the  
13 documents that the state has -- where the state has  
14 undertaken to audit this farm and point it out that  
15 this farm and its Nutrient Management Plan is in  
16 compliance with state law and that this particular  
17 grower and this Nutrient Management Plan has protected  
18 against runoff. That's at the very heart of this  
19 case.

20 And so I think in fairness, in addition to  
21 those STP levels, whatever they may be, high or low,  
22 that it would be important that the state has  
23 considered that and made that determination.

24 THE COURT: What do you call those? STP  
25 audits?

1 MR. WEEKS: They are farm audits, Your  
2 Honor, annual farm audits.

3 THE COURT: Well, Mr. Hopson was just  
4 suggesting that anything beyond the STP records isn't  
5 required.

6 MR. WEEKS: Well, Mr. Hopson and I  
7 disagree in that respect then. Because I think these  
8 are very -- I think in light of the fact that the  
9 state wants to put in certain fields that have STP  
10 levels that they consider to be high, that in fairness  
11 it ought to be shown that despite the fact that there  
12 may have been a high STP level, that the state was on  
13 that farm and on that year and determined for itself  
14 that there was compliance with the Nutrient Management  
15 Plan and that the Nutrient Management Plan of this  
16 grower was protecting against runoff.

17 THE COURT: Before I go back to  
18 Mr. Moll, Mr. Hopson, do you agree that for  
19 completeness, that any farm audits with respect to  
20 these particular growers be provided?

21 MR. HOPSON: Here's what I think, Your  
22 Honor.

23 They produced to us and we looked at the  
24 complete grower records for these 50 growers. As I  
25 recall, they filled three and a half boxes, okay? And



1 I'm not going to stand up here and suggest that we  
2 ought to move three and a half more boxes of documents  
3 into evidence.

4 I think you hit the right point by saying, if  
5 you want to look at STP records, let's look at all the  
6 STP records that are in the grower's files. That  
7 seems to be a reasonable compromise.

8 With all due respect to Mr. Weeks, if there  
9 are particular documents that Tyson or George's or  
10 anybody else finds in these files that we think are  
11 relevant, we can move them in in our case in chief  
12 because I've just heard a representation here that  
13 they're business records; that is, assuming your  
14 ruling that these are business records and admissible  
15 on that ground.

16 THE COURT: Right. Now, as to the  
17 volume with respect to these, you say, 50 growers,  
18 what's the volume of that document -- of that  
19 documentation, should they be required for fairness?

20 MR. HOPSON: I would think that  
21 if -- and Ms. Moll can correct me -- but I would think  
22 that the average grower has something like ten to  
23 twenty, maybe thirty STP test reports in their file.  
24 Depends on how many fields they have and how long  
25 they've been registered.

1 But say a grower's got three fields. That's  
2 about average in the IRW. Ten years of registration  
3 means thirty STP reports in that grower's files. Some  
4 of the big growers, you know, may have eight, ten  
5 fields, and you're going to see a bigger volume. But  
6 it's not going to much more than double the volume of  
7 the paper that's going to be moved into evidence.

8 THE COURT: All right. Ms. Moll, I need  
9 to give you an opportunity.

10 MR. WEEKS: I would just say, Your  
11 Honor, in the spirit --

12 THE COURT: Well, let me go to Ms. Moll  
13 here.

14 MR. WEEKS: Okay. I'm sorry.

15 THE COURT: Go ahead.

16 MS. MOLL: Your Honor, you can  
17 appreciate that the grower files are enormous, and the  
18 defendants obviously have other documents in mind that  
19 they want to include in this proffer.

20 I think the easiest way to handle this would  
21 be for them to identify what documents do they want  
22 included in connection with these particular grower  
23 files. Because otherwise, I think we're going to have  
24 as a mechanical matter a difficult time, you know,  
25 quickly organizing ourselves and doing that.

1 But obviously the defendants have certain  
2 documents that they want authenticated, and I don't  
3 know that Mr. Parrish could sit on the witness stand,  
4 you know, be handed a document by Mr. Hopson, and  
5 testify under oath that yes, you know, out of the  
6 blue, looking at this document, this is a business  
7 record from ODAFF, without being able to compare it to  
8 what's in the grower files at ODAFF.

9 THE COURT: Well then, he's an improper  
10 custodian. But frankly that technical objection  
11 strikes me cold.

12 You know, there are some authority for the  
13 proposition that if there is a signed certification by  
14 the public officer with actual custody of the  
15 documents, there is no need for further certification  
16 that the custodial authority was delegated to that  
17 person from the head of the department or agency  
18 entrusted by law with custody of the documents. Here,  
19 we've got the head of that particular agency, ODAFF;  
20 correct? So it seems to me that technical objection,  
21 I think, raised by Mr. Tucker should be overruled.

22 But the question is, what in fairness to  
23 satisfy the rule of completeness ought be required  
24 here? And I agree, Mr. Hopson has suggested a balance  
25 here that instead of, you know, three and a half box

1 loads' worth of documents and requiring you to do the  
2 defendants' work, perhaps to the extent that you're  
3 wishing to show the court a portion of the truth  
4 relative to STP results from these fields, it would  
5 seem to me that the balance suggested by Mr. Hopson  
6 may be the right balance, that what we need to see is  
7 the STP results as to these growers during their  
8 history of presenting or filing these records with  
9 ODAFF.

10 Any objection there, I mean, since Mr. Hopson  
11 suggests that it will not be nearly as great a volume  
12 as all of the records relative to those growers?

13 MS. MOLL: Your Honor, if I can have a  
14 moment to confer with Mr. Garren.

15 THE COURT: Yes.

16 MR. HOPSON: And, Your Honor, while  
17 she's conferring, I've been whispered to by several of  
18 my smarter colleagues here that suggests that maybe  
19 mechanically the way to do this is for us to begin our  
20 case, go ahead and put in a 24-, 25-D that will  
21 contain the soil test phosphorus results we want.

22 For example, if Mr. Tucker has a particular,  
23 you know, single document that he thinks is important  
24 for the case to see, or Mr. Weeks has a particular  
25 audit inspection report, we'll include that. And then

1 the court will have, you know, two parallel sets, if  
2 you will, of the soil test phosphorus results that we  
3 want you to see and perhaps a selected handful of  
4 other documents.

5 THE COURT: Well, except if I sustain  
6 your rule-of-completeness objection here, or argument,  
7 then we don't have to have two partial subsets of the  
8 entire picture; right?

9 MR. HOPSON: True.

10 THE COURT: It seems to me that --

11 MR. HOPSON: True.

12 THE COURT: -- rather than getting --  
13 and once again, so often, because I know you all have  
14 tried lots of cases, but, you know, I'm coming up to  
15 300, and so often you get these extreme positions.  
16 And so from my simple-minded approach here, instead of  
17 getting the extremes on both sides of what you  
18 consider to be representative samples, perhaps what we  
19 ought to look at is the truth, which covers not only  
20 the extremes but the middle ground as well.

21 MR. TUCKER: Your Honor, speaking for  
22 Cargill, may I adopt Ms. Moll's suggestion? I believe  
23 it makes the greatest sense because, for example, with  
24 regard to those Cargill growers that are in their  
25 list, the state intends to offer more than just STP

1 results. Her --

2 THE COURT: I saw that. We have more  
3 than STP here, yes.

4 MR. TUCKER: That's correct. And her  
5 suggestion was that the defendant, at least as to this  
6 defendant, Cargill, we would be more than happy to  
7 identify those exhibit numbers that we believe should  
8 be included to make the exhibit complete for the court  
9 and that would -- that would resolve the issue --

10 THE COURT: Well, how do you satisfy my  
11 concern that all I'm getting is extreme examples  
12 representing the two ends of the -- the two ends of  
13 the continuum?

14 MR. TUCKER: I understand your concern.  
15 Of course I can promise to be reasonable but --

16 THE COURT: Well, you're an advocate,  
17 Mr. Tucker. I mean, you're an advocate.

18 MR. TUCKER: Yes, sir.

19 THE COURT: As is Ms. Moll. I mean,  
20 that's why it seems to me that the rule of  
21 completeness is there.

22 Mr. Hopson.

23 MR. HOPSON: Yeah. And what I was going  
24 to just suggest, Your Honor, is that if you want to  
25 satisfy the rule of completeness -- and I agree that

1 you should -- we should put in all the STP results.

2 But what I was getting at was an administrative issue.

3 If Mr. Tucker -- and I'm not picking on  
4 Mr. Tucker who I like very much -- but if he wants  
5 five more pages in one of these grower files. I was  
6 struggling towards a way where the court could have  
7 one grower file that has all the STP results, has the  
8 pages that the plaintiffs want, and has the pages the  
9 defendants want, rather than technically satisfying  
10 the rule of completeness today and then having  
11 miscellaneous excerpts from grower files admitted in  
12 the record later.

13 Maybe that's not a goal that's worth  
14 pursuing, but that was all I was trying to suggest, is  
15 maybe we could get together for the court one grower  
16 file, including all the STP results for that grower.

17 THE COURT: You're saying one grower  
18 file for each of the 50 that --

19 MR. HOPSON: Right.

20 THE COURT: Ms. Moll, your thoughts  
21 there?

22 MS. MOLL: I guess I'm hearing a lot of  
23 different suggestions, Your Honor, so forgive me.

24 THE COURT: Yeah.

25 MS. MOLL: Obviously, we're coming to

1 the end of the state's case, and I am happy to work  
2 with Mr. Parrish in trying to gather the STP reports  
3 for the growers that we've identified. I'm trying to  
4 think, though, as a practical matter and as a timing  
5 matter, how do we get that done in a manner that makes  
6 sense?

7 THE COURT: Well, we can leave the  
8 state's case open and take arguments after the rule of  
9 completeness has been satisfied. I mean, that's how  
10 you do it mechanically.

11 MS. MOLL: And that would be fine, if  
12 that's what the court wishes.

13 THE COURT: Well, we've done it many  
14 times. We have to try to be practical here.

15 But Mr. Tucker is correct, you're not only  
16 wishing to admit ODAFF records that are STP test  
17 results, but other records as well; correct?

18 MS. MOLL: I think the two exhibits that  
19 Mr. Tucker is referring to are those Cargill exhibits  
20 that came in at the end. And so to avoid any  
21 objection, at least from the Cargill defendants, we  
22 decided to move to admit two exhibits that were on  
23 their trial list. It happens to be that those  
24 exhibits contain more than STP results.

25 THE COURT: Why don't I allow you all to



1 get your heads together and -- my thought is, at least  
2 with regard to STP results as to these 50 growers, I  
3 want to see everything since '98. If you want to  
4 throw additional records in for a convenience, I have  
5 no objection to that.

6 But it seems to me that at least as to the  
7 STP results, I want to see the history. And I want to  
8 get a sense, if I grab one of those grower files, to  
9 how consistent those STP tests are with regard to  
10 field No. 2 on Farmer Jones' property. You know, I  
11 want to see if, for instance, farmer Jones, although  
12 prohibited from putting on any poultry litter, is  
13 going from a 350 STP to a 450 despite being prohibited  
14 in applying poultry litter.

15 That's what I'm interested in seeing, so  
16 that's why I want to see all the records. I want to  
17 see them because they may cut either way here. But if  
18 the plaintiff wants to present STP records with regard  
19 to 50 growers, fine. But my ruling under 106 is  
20 you're going to provide me all those ODAFF STP records  
21 since '98, since inception.

22 Mr. Tucker.

23 MR. TUCKER: Your Honor, by implication  
24 of what you're saying, you also want to be able to  
25 validate that litter has not been applied to the

1 property, which would mean that you would need to have  
2 the annual filing that demonstrates whether litter was  
3 either or whether it was shipped out or sold, which is  
4 a separate document but it's also contained in the  
5 same file.

6 MR. HOPSON: It's referred to as the  
7 annual inspection report by Mr. Tucker.

8 MR. TUCKER: That's correct. But there  
9 is only -- would be only one of those for each grower  
10 for the year, and they would match up with the STP  
11 numbers of the state.

12 THE COURT: I'm not going to make the  
13 plaintiff include those unless there are annual  
14 inspection reports in this binder that I have here.

15 Are there such reports here?

16 MS. MOLL: I don't believe so, Your  
17 Honor, but I cannot guarantee that. I don't believe  
18 so.

19 THE COURT: All right. The plaintiff  
20 seeks primarily to present me soil test phosphorus --  
21 or soil test reports. I see also we have renewal  
22 registrations here.

23 What's the significance of providing me some  
24 renewal registrations and not others?

25 MS. MOLL: The purpose of the various

1 submissions within each exhibit, Your Honor, are just  
2 those documents that would tie a grower to an  
3 integrator. And then there are also times where  
4 within one grower file, you will see property being  
5 transferred from one grower to another but it's the  
6 same land.

7 And so you might see within the documents  
8 we've provided you paperwork for reflecting such a  
9 transfer but it would relate to the same land.

10 THE COURT: All right. So instead of  
11 growers, really what we're looking at is 50 grower  
12 operations?

13 MS. MOLL: I think that's right, yes.

14 THE COURT: All right. For instance,  
15 I'm looking at No. 2861-A. And in addition to an STP  
16 report and a renewal registration invoice, there's  
17 correspondence from Mr. Parrish to Mr. Nubbie,  
18 N-u-b-b-i-e, in Westville, Oklahoma.

19 MR. GARREN: If I might answer your  
20 question about that, Judge.

21 THE COURT: Yes.

22 MR. GARREN: If you look at the soil  
23 test that has no name on it, the correspondence ties  
24 to the STP level. Of that soil test to Mr. Nubbie  
25 because not -- because of the name is not on the soil

1 test itself. They came from his grower file. So if  
2 you read the letter, it will identify the STP level  
3 that's on the soil test and identify it to Mr. Nubbie.  
4 That's the reason why that's in there.

5 We've tried to link where there wasn't a name  
6 or different name in the event of a transfer, that  
7 that soil test, in fact, goes to that grower file in  
8 the ODAFF records.

9 MR. TUCKER: Your Honor, I guess that  
10 goes to prove the point I'm trying to make is, you  
11 can't view these -- these files are not maintained in  
12 the perfect fashion. That is to say, there are lots  
13 of tag ends and related letters and correspondences to  
14 make sense of a particular grower's operation.

15 You really need to see the annual report, as  
16 well as the correspondence that goes with it, as well  
17 as the STP reports. It doesn't -- it doesn't  
18 constitute a significant material addition in the  
19 number of papers, but it is to the issue area and the  
20 issue of completeness.

21 THE COURT: Well, but Mr. Hopson  
22 suggests that in terms of that degree of completeness,  
23 we're talking about three and a half legal boxes full  
24 of documents. I don't know about you, but I've got  
25 other cases to attend to. I'm not going to go through

1 every document in three and a half legal boxes full of  
2 documents. It's humanly impossible, Mr. Tucker.

3 MR. TUCKER: With respect to Mr. Hopson,  
4 I think his estimate is more like our discussion of  
5 the size of fish.

6 MR. HOPSON: I'm a fisherman, but I take  
7 offense to that. I looked at every one of those  
8 documents.

9 MR. TUCKER: If we were to add, for  
10 example, the annual reports for all the defendants and  
11 all the growers that are in there having to do with  
12 Cargill, you would have a very small amount of paper  
13 to the entire mass.

14 MR. HOPSON: May we confer?

15 THE COURT: Yes.

16 *(Discussion held off the record)*

17 MR. TUCKER: Your Honor, Mr. Hopson  
18 suggests that I just apply that to Cargill because I  
19 seem to be the one that wants to do that. I would ask  
20 if counsel objects to that; if she does not, perhaps  
21 we can reach accommodation.

22 MS. MOLL: If it's limited to Cargill,  
23 I'm happy to do that. I'm just trying, Your Honor, to  
24 -- we're happy to live with your ruling obviously.  
25 And if it's limited to STP tests and the addition by

1 Mr. Tucker, we can do our best to complete that as  
2 quickly as possible.

3 THE COURT: Mr. Weeks, I think you wish  
4 the same accommodation. Mr. Weeks.

5 MR. WEEKS: Well, OF course, I've argued  
6 vigorously for the introduction of those, and we only  
7 have three growers and so it wouldn't be like we're  
8 dumping into the record.

9 But I think I do have a special case with  
10 Mr. Bayer, Martin Bayer. And to the extent that the  
11 court is going to permit them to put in those STP  
12 records, despite the fact that in every inspection  
13 checklist from 2002 to 2005 he's listed in the  
14 Eucha-Spavinaw Watershed --

15 THE COURT: Well, if he's in  
16 Eucha-Spavinaw, then you don't have anything to worry  
17 about, do you?

18 MR. WEEKS: Well, I don't think I would  
19 have, you know, but they haven't conceded that point  
20 yet and the court hasn't ruled quite yet.

21 So, I mean, I would just say that in the  
22 event that the court does permit that in, I think that  
23 these -- these checklists would be significant to make  
24 that record complete to show that they are in the  
25 Eucha-Spavinaw Watershed.

1           Furthermore, as Ms. Moll made her argument  
2           today, she said this was a subset of growers and these  
3           STPs indicated that there were levels in the watershed  
4           that had exceeded the agronomic rate and that linked  
5           it to an integrator.

6           With regard to this particular grower right  
7           here, they didn't do that and it doesn't do that. And  
8           so, again, for that reason, too, I would ask that the  
9           Bayer document be excluded altogether

10           THE COURT: What about Bayer? We  
11           haven't specifically talked about that, Ms. Moll.

12           MS. MOLL: If I'm thinking of the  
13           correct grower, Your Honor, there are certain  
14           documents where Eucha-Spavinaw is identified in error,  
15           but where you look at the property, it is, in fact, I  
16           believe, within the IRW.

17           So I think that's probably an issue to be  
18           argued another day once these documents eventually  
19           come in, but I don't know that Mr. Weeks' concern  
20           needs to be addressed right now.

21           THE COURT: All right. How do we  
22           determine that as a matter of evidence?

23           MS. MOLL: Well, I guess my thinking on  
24           that is, if we're going to go through this next step  
25           with the ODAFF records, we can take another look at

1 Mr. Bayer and provide the court with enough linkage  
2 between grower, integrator, and documents that reflect  
3 that he's in the IRW.

4 THE COURT: Yeah. I'm not -- Mr. Weeks,  
5 if the plaintiff contends that Eucha-Spavinaw is  
6 placed on these records in error, although they may  
7 not meet their burden of proof with regard to this  
8 particular grower, Bayer, I'm not going to preclude  
9 them at this juncture from attempting to -- from  
10 placing these into evidence.

11 Ms. Moll, will you accommodate Mr. Weeks, as  
12 you did with respect to Mr. Tucker, as to the  
13 additional documents that Mr. Hopson and the other  
14 defendants do not wish to include for Rule 106  
15 purposes?

16 MS. MOLL: If the checklist that  
17 Mr. Weeks has identified is, in fact, in the grower  
18 file for those George's growers, I'm happy to include  
19 it.

20 THE COURT: All right. Let's do that.  
21 I'm going to give you some time here to tie up the  
22 loose ends on that.

23 Is there anything else to put this thing to  
24 bed?

25 MS. MOLL: I don't think so, Judge.



1 THE COURT: All right. Let's see if we  
2 can approach it along those lines.

3 And the Rule 106 objection as to what's been  
4 presented thus far is sustained subject to tying this  
5 all up along the lines that we've been discussing.

6 Anything else?

7 MS. MOLL: No.

8 THE COURT: All right. How close are  
9 we, Mr. Bullock?

10 MR. BULLOCK: You know, I'm surprised  
11 you even call on me on this. I have such low  
12 credibility, at least in my own eyes, on this subject.

13 THE COURT: Well, you have higher  
14 credibility in my eyes. Go ahead.

15 MR. BULLOCK: Well, thank you.

16 We have one deposition and I will call the  
17 final witness, Mr. Todd King, and that will be about a  
18 30-, 45-minute exam. That one I feel pretty confident  
19 in my estimate on, but we have one deposition to read  
20 and then we will rest.

21 THE COURT: Did we not have two experts  
22 that we had to let go and that were going to be called  
23 back? I understood that the defendants had waived  
24 cross on one of those but not as to the other.

25 MR. BULLOCK: Dr. Engel was the other

1 one that we had to call back whose cross was  
2 interrupted, and we called him back and got that  
3 completed.

4 THE COURT: You're right. Thank you.

5 All right. Let's take our recess. We'll be  
6 back in an hour and fifteen minutes, which will be  
7 1:10.

8 *(Lunch recess was taken)*  
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## C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 9th day of December 2009.

s/ Brian P. Neil

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Brian P. Neil, CSR-RPR, CRR, RMR  
United States Court Reporter